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

Before Sh. H. S. Sidhu, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 579/Del/2013 : Asstt. Year : 2009-10

Hyatt International-Southwest Asia Ltd., Office 301, Level 3, Precinct 3, Dubai International Financial Centre (DIFC), PO Box – 506727, Dubai	Vs	Additional Director of Income Tax, Range-1, International Taxation, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AACCH2598H		

ITA No. 779/Del/2014 : Asstt. Year : 2010-11

Hyatt International-Southwest Asia Ltd., Office 301, Level 3, Precinct 3, Dubai International Financial Centre (DIFC), PO Box – 506727, Dubai	Vs	Assistant Director of Income Tax, Circle-1(2), International Taxation, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AACCH2598H		

ITA No. 1762/Del/2015 : Asstt. Year : 2011-12

Hyatt International-Southwest Asia Ltd., Office 301, Level 3, Precinct 3, Dubai International Financial Centre (DIFC), PO Box – 506727, Dubai	Vs	Additional Director of Income Tax, Range-2(1), International Taxation, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AACCH2598H		

ITA No. 957/Del/2016 : Asstt. Year : 2012-13

Hyatt International-Southwest Asia Ltd., Office 301, Level 3, Precinct 3, Dubai International Financial Centre (DIFC), PO Box – 506727, Dubai	Vs	Deputy Commissioner of Income Tax, Circle-2(1)(1), International Taxation, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AACCH2598H		

Assessee by : Sh. Percy Pardhiwala, Adv.
Revenue by : Sh. G. K. Dhall, CIT DR

Date of Hearing: 12.09.2019		Date of Pronouncement: 04.12.2019

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee against the orders dated 21.11.2012, 28.11.2013, 28.01.2015 and 18.12.2015 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Since, the issues involved in all the appeals are common, they were heard together and are being disposed off by common order.

3. In ITA No.579/Del/2013, following grounds have been raised by the assessee:

> ***"Ground No. 1 - Alleged Permanent Establishment in India of the Appellant under the Article 5(1) and 5(2)(i) of the India UAE Tax Treaty (the Tax Treaty)***
>
> *1.1 On the facts and in the circumstances of the case and in law, the Assessing Officer ('AO') and the Dispute Resolution Panel ('DRP') erred in concluding that the Appellant has a Permanent Establishment ('PE') in India under Article 5(1) and 5(2)(i) of the Tax Treaty based on the following erroneous conclusions:*
>
> *a. That the Appellant had always a fixed place of business at its disposal throughout the year in the Hotel premises of its Customer in India, including the chambers of Managing Director;*

b. Its expatriates were continually present in India and are actually operating the Hotels belonging to the owners in each and every manner;

c. The Appellant provides Central Reservation System (CRS) which constitutes place of business; and

d. The assistance in recruitment of General Manager by the Hotel Owners / Customers and this oversight tantamount to deputation and that the Appellant also has a lien on such employment.

1.2 The Appellant prays that it operates entirely and renders various oversight and consultancy services from the United Arab Emirates with respect to formulating strategic plans, policies, processes, guidelines and parameters. The Appellant's Employees visit India for Service PE under Article 5(2)(i) of the Tax Treaty and even otherwise all the above factual conclusion are baseless and therefore, the decision of the AO / DRP in this matter be reversed and the no PE position as declared by the Appellant in the Return of Income be accepted.

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

2.1. On the facts and in the circumstances of the case and in law and without prejudice to Ground No.1 above, the AO / DRP erred in arbitrarily adopting 25 percent of the gross receipts as taxable income attributable to the Appellant's alleged PE in India under Article 7 of the Tax Treaty.

2.2. The Appellant prays that it has incurred large operating losses as depicted by its Audited Financial Statements and therefore, no profit or taxable income is otherwise attributable to the Appellant's alleged PE in India under Article 7 of the Tax Treaty. Therefore, the highly excessive and arbitrary attribution of profits to the alleged PE adopted by the AO and upheld by the DRP be reversed and relief be allowed to the Appellant accordingly.

Ground No. 3 - Erroneous alternative taxation of India source income as 'Royalty' under Section 9(1)(vi) of the

Income Tax Act, 1962 ('the Act') and Article 12 of the Tax Treaty

3.1 On the facts and in the circumstances of the case and in law and without prejudice to the alleged PE of the Appellant in India, the AO / DRP erred in equating consultancy services rendered by the Appellant to be in the nature of 'Royalty' under the Tax Treaty and the Act on the contention that its relates to provision of 'know-how, skill, experience, commercial information and intangibles'.

3.2 The Appellant prays that it is in hotel consultancy business and the services rendered are not in the nature of Royalty either under the Act or under the Tax Treaty and even otherwise, the provision of know-how, etc in the Strategic Oversight Services Agreement is incidental and in furtherance to the rendering of strategic oversight and consultancy services which is the essence of the arrangement and that the know-how / intangibles have no independent utility or value.

3.3 The Appellant prays that the conclusion of the AO / DRP in the re-characterization of the services / consultancy income streams under Strategic Oversight Services Agreement to 'Royalty' under the Act and the Tax Treaty and alternative taxation on gross basis be held to be void and un-warranted and as there is no Article in the Tax Treaty taxing 'Fees for Technical Services' in Source Country, it be held that the Appellant is not taxable in India.

Ground No. 4 - Mistakes in calculation of income attributable and taxation of the alleged PE of the Appellant in India

*4.1 On the facts and in the circumstances of the case and in law and without prejudice to the earlier grounds of appeal, the AO erred in computing the taxable income of the alleged PE in India at gross income (i.e. Rs. 8,51,41,569) instead of the business profits to be attributed at 25% at Rs. 2,12,85,392 (Rs. 8,51,41,569 * 25%) as concluded in the assessment order.*

4.2 The AO erred in denying credit for TDS of Rs 87,99,091 while computing the demand payable by the Appellant.

4.3 The AO erred in levying of consequential charging of interest under Section 234B of the Act which is even otherwise not applicable in the case of the Appellant as it being Non-Resident and not liable to pay any Advance Tax under Section 209 of the Act due to its income being subject to deduction of tax at source.

4.2 The Appellant prays that the AO be directed to correct the above errors and re-compute the taxable income and tax demand, if any, accordingly."

4. The brief facts of the case are that Hyatt International South West Asia Limited ('the Company' / the Assessee') is a Company incorporated under the Companies Law, DIFC Law No. 3 of 2006 in United Arab Emirates (UAE). The Assessee is engaged in rendering management and consultancy services in the Hotel Sector (Hyatt Brand) primarily in the Asia Pacific Region. The Assessee has entered into two Strategic Oversight Services Agreements ('SOSA') both dated 4th September 2008 with Asian Hotels Limited, India ('AHL') - one for AHL's Delhi Hotel and one for AHL's Mumbai Hotel.

5. The Assessing Officer held that the Assessee had a PE in India under Article 5(1) and Article 5(2) of the India-UAE Tax Treaty based on the following grounds:

"(i) The assesse always has a fixed place of business at its disposal throughout the year in the Hotel premises of its Customer in India, including the chambers of MD;
(ii) The assesse's expatriates were continually present and are actually operating the Hotels belonging to the owners in each and every manner;
(iii) The Assessee provides Central Reservations System (CRS) which constitute place of business."

The DRP upheld the action of the Assessing Officer.

6. At the outset, the ld. AR has taken us to the background of the case as under:

> ***"Brief Background of Hyatt International South West Asia Limited.***
>
> *1. Hyatt International South West Asia Limited ('the Company' / the Assessee') is a Company incorporated under the Companies Law, DIFC Law No 3 of 2006 in United Arab Emirates (UAE). The Assessee is engaged in rendering management and consultancy services in the Hotel Sector (Hyatt Brand) primarily in the Asia Pacific Region.*
>
> *2. The Assessee is a Tax resident of UAE as understood within the Article 4 of the India-UAE Tax Treaty ('Tax Treaty') and is eligible and has taken recourse to the beneficial provisions of the Tax Treaty under Section 90(2) of the Act as compared to the provisions of the Income-tax Act 1961 ('The Act').*
>
> *3. The Assessee has entered into two Strategic Oversight Services Agreements ('SOSA') both dated 4 September 2008 with Asian Hotels Limited, India ('AHL') - one for AHL's Delhi Hotel and one for AHL's Mumbai Hotel.*
>
> *4. The Assessee has provided to AHL strategic oversight services with respect to its Hotels in the form of assistance in formulating strategic plans, policies, processes, guidelines and parameters from time to time with respect to various aspects of hotel operations such as branding, marketing development, day-to-day onsite operations and other facets / parameters and received consultancy fees.*
>
> *5. For the Financial Year ('FY') 2008-09 relevant to Assessment Year ('AY') 2009-10, the Assessee has received income of Rs. 8,51,41,569 on which taxes have been withheld at source by AHL aggregating to Rs. 87,99,091.*
>
> *6. In the return of income filed on 29 September 2009, the Assessee claimed refund of Rs. 87,99,091 on the contention that its income from the services to AHL were not taxable in India under the Tax Treaty. This is because there is no specific Article on 'fees for technical services' under the Tax Treaty which could tax such income of the Assessee in India at source.*

Further, apart from no fixed place of business, office or branch in India, the aggregate presence of Assessee's employees in India did not exceed the specified nine months threshold within any twelve month period under Article 5(2)(i) of the Tax Treaty. Thus, the Assessee did not constitute any permanent Establishment ('PE') in India as contemplated under Article 5 and its business income from AHL was also not taxable under Article 7 of the Tax Treaty."

7. He argued that the Assessing Officer has erroneously concluded that the assessee was actually operating hotels belonging to the owners in each and every manner. The observation of the Assessing Officer that there is continuous presence of the assessee through its employees is factually incorrect. It was argued that the assessee had no fixed business at its disposal throughout the year for the hotel provisions including chambers of M.D. The employees have stayed and performed their obligation under SOSA with AHL and the same is noted from the details of the stay, which is less than 9 months.

8. The ld.AR explained in detail about Article 5 of India UAE DTAA, which has been mandated by Protocol dated 26.03.2007. Articles 5(1) and 5(2) are as under:

"Article 5
Permanent Establishment
1. For the purposes of this Agreement, the term "permanent establishment" mean a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially;
(a). a place of management;
(b). a branch;
(c). an office;
(d). a factory
(e). a workshop;
(f). a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g). a farm or plantation
(h). a building, site or construction or assembly project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than 9 months;
(i). In the furnishing of services including consultancy services by an enterprise of a Contracting, state through employees or other personnel in the other contracting State, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve month period."

9. It was primarily argued that as per Article 5(1), the Permanent Establishment means a fixed place of business in which the business is carried out and in the case of assessee they did not have any fixed place of business, but were present intermittently for execution of the contracts and not stayed more than nine months in any particular year. He also argued that as per Article 5(2)(i), in the case of consultancy services by enterprise, an aggregate period of more than 9 months will only be considered as PE and since the assessee is in the business of consultancy services and not stayed for more than nine months, no Permanent Establishment can be attributed.

10. He also brought us to Article 7, where the taxability of the business profits is discussed as under:

"Article 7
Business profits
1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the

other Contracting State through a permanent establishment situated therein, there shall, in each Contracting State, be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. (This para is replaced by protocol dated 26th March 2007. The protocol is given at the end.)

4. In so far as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the methods of apportionment adopted shall, however, be such that the result shall be in accordance with the principle contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by the permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this agreement, then the provisions of those Articles shall not be affected by the provisions of this Article."

11. He argued that as per clause (7) of Article 7, where profits include items of income which are dealt with separately in other Articles of this Agreement, then provisions of those Articles shall not be affected by the provisions of this Article. Saying so, he argued that consultancy services fall under the category of FTS and hence, Article 7 of the Treaty would not apply to such receipts.

12. The ld. AR has filed the Tax Residency Certificate of the assessee at page No. 9 of the paper book which reads as under:

> "TAX RESIDENCE CERTIFICATE
> *The Ministry of Finance hereby certifies that, pursuant to the Agreement between The Government of the United Arab Emirates and the Government of the INDIA for Avoidance of Double Taxation and the Prevention of Fiscal evasion with respect to Taxes on Income and on Capital HYATT INTERNATIONAL - SOUTH WEST ASIA LIMITED. - LICENCE No: CL 0501 is qualified to enjoy the benefit of the mentioned Agreement as a resident in the United Arab Emirates.*
>
> *This certificate is valid from the date hereof and continuing for a period of one year.*
>
> *Issued in Dubai on THURSDAY the 29 / 01 / 2009 without any responsibility whatsoever on the Ministry of Finance."*
>
> *Sd/-*
> *Khalid Ali-Al-Bustoni*
> *Executive Director for Revenue and Budget*

13. The ld. AR argued that FTS is chargeable in India in normal circumstances, but as per DTAA with UAE, owing to Article 7(7), FTS is not chargeable. He also argued that the profits of the enterprise of the contracting State shall be taxable only in that State unless the enterprise carries on the business through Permanent Establish situated therein. Thus, the profits would be taxable only if the assessee has got a PE in

India and since the assessee has no PE, the profits would not be taxable. It was argued that the employees of the company come to India, stay for less than nine months, execute the work and then go back to the parent country. He argued that as per the details filed at page No. 89 and 90 of the paper book wherein the period of duration of stay of all the employees has been given. He argued that none of the employees stayed for more than nine months. The details of the job description of various employees for rendering Assistance to India Hotel owners and the details of services rendered in India are as under:

Sr. No	Name of the Employee	Designation	Job Description
1	Peter Fulton	Managing Director	• Overseeing the operations of hotels per agreement • Assistance in meeting the standards of operation, profitability, legal and financial fiduciary requirements • Overseeing administrative duties, client relationship and budgets, resources utilization and reporting of information. • Supervising the implementation of the Corporate Hotel Actions • Guidance on maintaining Brand Standards and compliances with management contracts and agreements
2	N Ravichandran	Director of Finance	• Assisting the operations of the finance department and local compliances • Assistance with respect to the use of technology in the hotels and safeguard the confidentiality of finance data. • Assistance in aligning of finance activities with the Corporate Marketing Strategy and Functions of Divisional Office • Oversee budgets and reporting of information
3	Nirbhik Goel	Director of Human Resource	• Guide the Human Resource Department in implementing the strategies of the Hotel Corporate Values, Culture, Policies and Procedures • Assistance with respect to the recruitment and development of people • Oversee the payroll management, maximization of employee's productivity, manpower planning
4	Thierry Bertin	Director of Sales and Marketing	• Assistance in promoting and managing the Brand Hyatt for the hotels within the area • Guidance on the strategies for revenue and market share enhancement, development of sales team, implementation of marketing strategies

5	Sharad Kapur	Director Revenue Management	• Guidance on strategic planning, setting up pricing and distribution strategies • Guidance to hotels in their forecast process
6	Kamal Atal	Internal Auditor	• Guidance on internal controls with regard to Internal Audit of the Hotels.

14. The ld. AR reiterated his arguments about the taxability of the income earned in India and the submissions were given before the Revenue Authorities at page Nos. 79, 80, 81 & 82 of the paper book as under:

"The Additional Director of Income tax ,
Range I ,(International Taxation)
Room No.404,
4lh Floor, Drum Shaped Building,
I.P Estate
New Delhi- 110 002

25 August 2011

Dear Sir,

Hyatt International South West Asia Limited('the Company'/'Hyat Dubai')

Permanent Account Number: AACCH2598H
Assessment Year (AY): 2009-2010
Notice issued under Section 142(1) r.w.s 143(3) of the Income-tax Act 1961 ('the Act')

We are in receipt of the captioned notice (enclosed as Annexure 1) requiring us to furnish various details/information relating to captioned assessment year. In this regard, we would like to invite your attention to our previous submission dated 17 May 2011 (enclosed as Annexure 2) wherein all the requisite details have already been furnished before you in the past.

In connection with the additional details/clarification required, we are happy to enclose/provide our replies enumerated as below:

1. During the subject assessment year under consideration, the Company is in receipt of the management fees from Asian Hotels Limited.

2. A brief submission explaining as to why the receipts in the hands of the Company by way of management fees should not be chargeable to tax in India is enclosed as Annexure 3

3. The Company has not raised any bill on Indian customers/Hotels Owners against the use of its name.

4. Copy of the Double Taxation Avoidance Agreement entered into between India and United Arab Emirates ('UAE') is enclosed as Annexure 4

Trust the same meets your requirements.

We would be happy to submit any further details / information that may be required.

For Hyatt International South West Asia Limited

Sd/-
Peter Fulton
Authorized Signatory

15. The assesse has further brought to our notice the submissions made before the revenue authorities as to why the receipt should not be taxable in India as fee for technical services.

"Hyatt International - South West Asia Limited. UAE ('Hyatt Dubai'/ 'the Company') was incorporated in Dubai. United Arab Emirates (UAE) on 27 November 2007. During the subject assessment year under consideration, Hyatt Dubai has earned is in receipt of Management fees / Incentive fees pursuant to Strategic Oversight Agreement entered with Asian Hotel Limited (Delhi and Mumbai). These fees are towards assistance in formulating and establishing the overall strategic plans, policies, processes, guidelines and parameters, in accordance with the Hyatt Operating Standards.

2. Hyatt Dubai being a tax resident of UAE and the provisions of the Treaty being more beneficial as compared to the Act, for the purpose of this Return, no income is chargeable to tax in India taking the beneficial provisions under the Treaty. Hence, the management fees received are not taxable in the financial year under consideration and reasons for the same are enumerated below.

1) Under Section 90(2) of the Indian Income-tax Act 1961 ('the Act"), a taxpayer is governed by the provisions of the Act only if the same are more beneficial as compared to an applicable Tax Treaty

2) In the absence of any Article dealing with 'Fees for technical services' under the Treaty, the receipt of such services constitutes 'business income' taxable only in accordance with Article 7 of the Tax Treaty read with Article 5 thereof.

3) Further, since Hyatt Dubai has no fixed place of business, office or branch in India and the presence of its employees or other personnel has not exceeded 9 months in India within any twelve month period, it does not constitute a Permanent Establishment in India as contemplated under Article 5 of the Treaty and therefore taxability under Article 7 of the Tax Treaty is not attracted

4) Without prejudice to the above, the Income received by Hyatt Dubai should not be taxable as per Article 22 of the Indo UAE Treaty, as income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in Treaty, shall be taxable only in that Contracting State.(i.e. Dubai)

Our above contention is upheld by the cases enumerated in Appendix I."

16. He further argued that without prejudice to the above arguments, profits cannot be taxed in the Contracting State as per Article 22 of the Treaty regarding other income, which reads as under:

"Article 22
Other Income

1. Subject to the provisions of paragraph 2, items of income of a resident of a contracting state, wherever arising, which are not expressly dealt with in the foregoing articles of this Agreement, shall be taxable only in that Contracting State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the order Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

17. He also relied on models and judgments of OECD Model Convention and commentary and also judgment of CIT vs. Visakhapatnam Port Trust (1983) 144 ITR 146 (AP), Motorola Inc. v. DCIT (2005) 95 ITD 269 (Del SB) and Clifford Chance, United Kingdom vs DCIT (2002) 82 ITD 106(Mum) and argued that based on these judgments, no profits can be attributable to PE. The submissions of the assessee in the background of the case read as under:

"i.) We, Hyatt International - South West Asia Limited ('HISWA' or 'Hyatt Dubai'), are a Company incorporated under the Companies Law, DIFC Law No 3 of 2006 in United Arab Emirates (UAE). We are engaged in rendering management and consultancy services in the Hotel Sector (Hyatt Brand) primarily in the Asia Pacific Region.

ii.) We are a tax resident of UAE as understood within Article 4 of the India-UAE Tax Treaty ('the Tax Treaty') (copy enclosed as Annexure 1) and eligible to benefits stated therein. Refer our submissions dated 17 May 2011 enclosing copy of our UAE Tax Residency Certificate.

iii.) We have entered into two Strategic Oversight Agreements both dated 4 September 2008 with Asian Hotels Limited, India ('AHL') - one for their Delhi Hotel and one for their Mumbai Hotel.

iv.) Under the said Agreements, we have provided to AHL strategic services with respect to assistance in formulating strategic plans, policies, processes, guidelines and parameters from time to time with respect to various aspects of hotel operations such as branding, marketing development, day-to-day onsite operations and other facets / parameters. For details refer our submissions dated 24 June 2011.

v.) For the AY 2009-10, we have received income of Rs. 8,51,41,569 on which taxes withheld at source aggregate to Rs. 87,99,091.

vi.) In our return of income filed on 29 September 2009, we had claimed refund of Rs. 87,99,091 as the income from the said services were not taxable in India as there is no specific Article on 'fees for technical services' under the Tax Treaty which can tax such income in India.

vii.) During the financial year 2008-09 relevant to AY 2009-10, various personnel / employees of our company travelled to India and they stay in India for the purpose of rendering services aggregates to 158 days (kindly see revised working submitted to you vide our letter dated 15 December 2011).

viii.) We had vide our submissions dated 17 May 201 land 15 December 2011 explained that the stay of our employees in India did not exceed 9 months in any twelve months period as stipulated under Article 5(2)(i) of the Tax Treaty and in absence of any specific Article in the Tax Treaty on 'Fees for Technical Services (FTS)', our business income is not taxable in India under Article 7 of the Tax Treaty.

ix.) We have received the Department's letter dated 23 December 2011 (Annexure 2) wherein it is alleged that 'there appears that the assessee company has a permanent establishment in India in different forms. Therefore, profits attributable to PE are taxable under the law. You are therefore

requested to please give a working of profit attributable to the PE, along company supporting evidences.

x.) Subsequently, our discussions suggests that the forms of Permanent Establishment ('PE envisaged in the Department's letter relates to fixed place PE under Article 5(1) and Service PE under Article 5(2)(i) of the Tax Treaty. Even otherwise, any other forms of PE under Article 5(1) or 5(2) (e.g. a place of management, branch, factory, etc) or under Article 5(4) - Dependant Agent PE have no relevance to the facts of our case.

xi.) Our submissions on non-constitution of our PE in India under Article 5(1) and under Article 5(2)(i) of the Tax Treaty are entailed in paragraph 2 below.

xii.) Without prejudice to our above submissions, we submit that we have incurred losses in 2008 and 2009 and thus, no profits can be attributed under Article 7 of the Tax Treaty to our alleged PE under Article 5(1) or under Article 5(2)(i) therein. Our audited financial statements for the calendar years 2008 and 2009 are enclosed as Annexures 3 and 4 respectively.

18. The ld. AR submitted the following points on the issue of non-constitution of PE in India:

"i.) Article 5(1) of the Tax Treaty is reproduced as under:

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

ii.) The above Article is in line with Article 5(1) of the Organisation for Economic Co- Operation and Development Model Convention ('OECD MC'). In view of same, the OECD Commentary of July 2010 on Article 5 of the OECD Model Tax Convention ('OECD Commentary'), can be taken recourse to for guidance.

iii.) In terms of Paragraph 2 of the OECD Commentary, the Article 5(1) of the OECD MC contains the following conditions:

a) The existence of a 'place of business', i.e. a facility such as premises;

b) This place of business must be 'fixed', i.e. it must be established at a distinct place with a certain degree of permanence;

c) The carrying on of the business of the foreign 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 foreign enterprise in the State in which the fixed place is situated.

iv.) As per Paragraph 4 of the OECD MC, the term 'place of business' covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. 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. 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.

v.) In this regard, it is pertinent to note the following example1 cited in the OECD commentary, which suggest that regular presence of employees in the Other Contracting State constitutes PE only on satisfaction of the disposal test:

> *"A second example is that of an employee of a company who, for a long period of time, is allowed to use an office in the headquarters of another company (e.g. a newly acquired subsidiary) in order to ensure that the latter company complies with its obligations under contracts concluded with the former company. In that case, the employee is carrying on activities related to the business of the former company and the office that is at his disposal at the headquarters of the other company will constitute a permanent establishment of his employer, provided that the office is at his disposal for a sufficiently long period of time so as to constitute a "fixed place of business…… "*

vi.) As per paragraph 4.6 of the OECD MC, the words "through which" stipulate that the business activities need to be carried on a particular location that is at the disposal of the enterprise for that purpose.

vii.) We also invite attention to the Commentary of Klaus Vogel in his book Double Taxation Convention which suggests that the power of disposition test is not satisfied if a customer of an enterprise makes available certain premise to the enterprise for use by the latter in performing specific work there (Annexure 5)

viii.) We submit that a fixed place of business is constituted only where it is a physical location at the disposal of foreign enterprise through which its business is carried on. Such fixed place of business may not be owned or leased by the foreign enterprise. As long as it is at the disposal of the enterprise in the sense of having right to use the premises for the purpose of its business (and not solely for the purpose of the project undertaken on behalf of the owner of the premises as are the facts in our case), a fixed place PE can be constituted and not otherwise.

ix.) In Airlines Rotables vs. JDIT (2010) 131 TTJ 385 (Mum Trib), the Mumbai Tribunal has upheld the above OECD principles and held that, in order for a PE to come into existence under Article 5(1) ("the basic rule"), three criteria have to be satisfied viz. (a) the physical criterion (existence of physical location) (b) subjective criterion (right to use that place) and (c) functional criterion (carrying on business through that place). It is only when the three conditions are satisfied that a PE under the basic rule can be said to have come into existence.

x.) In Motorola Inc. v. DCIT (2005) 95 ITD 269 (Del SB) pp 401, the Special Bench of the Delhi Tribunal held that merely demonstrating that certain space is available to the non-resident is not enough and for a PE the non-resident must have a place / premises at its disposal as a matter of right. Reliance is also placed on the decision of Galileo International Inc. V. DCIT[2009] 116 ITD 1 (Del) which upheld similar principle.

xi.) The Supreme Court in the case of Morgan Stanley and Co. (2007) 292 ITR 416 (SC) has held that the following two conditions need to be satisfied in order to create a fixed base PE:

- Existence of a fixed place of business; and

- Carrying out of business from such fixed place of business

xii.) There have been several other judicial precedents supporting the above principles / proposition initially laid down by the OECD.

xiii.) We submit that under the agreement, we have no right to use the premise of AHL and no premises of AHL are at our disposal. Thus, the location test as outlined in (a) above is not fulfilled.

xiv.) Further, the term 'fixed' in the expression 'fixed place of business' postulates a link between the place of business and a specific geographical point. As regards the question whether the place of business can be considered "fixed", it should be examined vis-a-vis a specific geographical point as well as certain degree of permanency.

xv.)Per Paragraph 6 of the OECD Model Convention and Commentary, a place of business should exist with some degree of permanency i.e. it should not be purely of a temporary nature. The OECD MC has quoted the experience of the Member Countries that PE has been construed not to exist where business has been carried out through a place of business maintained for less than six months.

xvi.) With respect to above principle, we invite attention to the decision of the Andhra Pradesh High Court in CIT v. Visakhapatnam Port Trust (1983) 144 ITR 146 (AP) which has held that a Permanent Establishment is a virtual projection of the foreign enterprise of one Country into the soil of the other Country. The requirement is that place should exist for some reasonable period sufficient to establish a nexus with the place of operation so that it could be said to be permanent in an objective sense - being quite the opposite to "for a limited period". In order to hold that a PE is in existence, the duration

of the profit making activities should not be for a very short and very limited period.

xvii.) In the decision of the Special Bench of the Delhi Tribunal in Motorola Inc. v. DCIT (2005) 95ITD 269 (Del SB) pp 401, the Tribunal rejected the contention that frequent visit of the employees to India and provision of office facilities to these employees constituted a fixed place of business for the Assessee.

xviii.)Further, keeping in mind that Article 5(2)(i) of the Tax Treaty specifically provides for the 9 months threshold, any period less than that constituting a PE under Article 5(1) of the Tax Treaty, would defeat the very purpose Article 5(2)(i) of the Tax Treaty

xix.) During the financial year 2008-09, our employees have travelled to India for rendering services to AHL and number of days of services (part / full days and more than one project at a time) during the year aggregate to 158 days and this cannot be construed to satisfy the degree of permanency test for constituting Fixed Place PE under Article 5(1) of the Tax Treaty.

xx.)Further, we submit that what is being carried out in India is the business of AHL and we only render strategic oversight services as may be required to AHL under the agreement and this cannot be construed that we are carrying out any business in India.

xxi.) In view of above, we submit that we do not constitute PE under Article 5(1) of the Tax Treaty and our constitution of PE in India, if any, needs to be evaluated under Article 5(2)(i) of the Tax Treaty only - see paragraph 2.2 below .

xxii.) Without prejudice to our above submission, our case cannot be covered under Article 5(1) of the Tax Treaty due to specific coverage under Article 5(2)(i) of the Tax Treaty. This is due to the well settled principle that a specific provision prevails over general provisions. We place reliance on the decision of High Court of Uttarakhand in M/s BKI/HAM (2011) 15 taxmann.com 102 which has upheld this principle in the context of PE. In this decision the High Court has held that "Article 5(3) of the Treaty provides that in order to constitute a

permanent establishment such site or project should continue for a period of more than six months in order to constitute a permanent establishment Since a categorical finding of fact has been given by the appellate authority that the contract was for less than six months, it becomes absolutely clear that the assessee did not have a permanent establishment in India as per article 5(3). Article 5(3) provides a specific provision which covers the provision of article 5(2). The specific provision would prevail over the general provision.

19. He also argued on the issue that the assessee cannot be even considered as Service PE under Article 5(2)(i) of the Tax Treaty due to the following reasons:

"i.) As per Article 5(2) of the India- UAE tax treaty, PE includes specially (a) place of management; (b) a branch; (c) an office; (d) a factory;(e) a workshop; (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources (g) a farm or plantation; (h) a building site or construction or assembly project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than 9 months ; (i) - see point (iv) below.

ii.) A Place of Management under Article 5(2)(a) of the Tax Treaty is a place where decisions significant to the business of the enterprise are taken. HISWA is incorporated and based outside India and it operates entirely outside India. The Board of Directors (BOD) of Hyatt Dubai are entirely based and operate from outside India and so accordingly it cannot be construed that Hyatt Dubai has a place of management in India. The availing of services by the Indian Hotel Owners from Hyatt Dubai can by no stretch of imagination be construed as a Place of Management of Hyatt Dubai in India.

iii.) We also do not have any branch, office, factory, workshop, mine / etc, farm / plantation, construction, etc - thus, Article 5(2)(b) to (h) or Dependant Agent PE under Article 5(4) of the Tax Treaty (in absence of any agency type arrangement in our case) are clearly not applicable to the facts of our case under consideration. Without prejudice to the same we would like to submit that a specific provision

should prevail over the general provision and accordingly Hyatt Dubai should not constitute a PE under Article 5(2)(b) to (h) of the India- UAE tax treaty, in view of a specific provision provided on Service PE under Article 5(2)(i) of the India- UAE tax treaty.
iv.) We once again invite attention to the decision of High Court of Uttarakhand in M/s BKI/HAM (2011) 15 taxmann.com 102 pursuant to which our coverage under aforesaid Sub-Articles of Article 5 is not warranted due to specific coverage of our case under Article 5(2)(i) of the Tax Treaty.

v.) Article 5(2)(i) of the Tax Treaty is reproduced as under:

> *Article 5(2) The term "permanent establishment" includes especially:*
>
> *"(i) the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period"*
>
> *vi.) As submitted earlier, during the financial year 2008-09, our employees have travelled to India for rendering services to AHL and number of calendar days of services (part / full days and more than one project at a time) during the year aggregate to 158 days. Refer submissions vide our letter dated 15 December 2011.*
>
> *vii.) As per paragraph 42.39 of the OECD MC, the number of days for Service PE is as per Calendar days regardless of the number of individuals performing such services during that day. This principle has also been upheld by the Mumbai Tribunal in Clifford Chance, United Kingdom v. DCIT [2002] 82 ITD 106 (MUM.) albeit in the context of Article 15 - Independent Personal Services wherein it was held that a similar rule is to be applied.*
>
> *viii.) In fact, we are currently compiling details of time spent on individual and separate projects (Mumbai and*

Delhi) and each of the same would be far below the threshold of 9 months stipulated by the Tax Treaty.

ix.) Attention is also invited to the decision of the Hyderabad Tribunal in the case of ACIT v. Viceroy Hotels Ltd [2011] 11 taxmann.com 216 (Hyd) wherein in the context of India- Thailand Tax Treaty, the Tribunal has held that since the number of days presence in India was below the prescribed threshold of Service PE of 183 days, no Service PE of the Foreign Company was constituted and in absence of any FTS article in the Tax Treaty, the income of the foreign company was not taxable in India.

x.) In view of above, we submit that we do not constitute PE under Article 5(2)(i) of the Tax Treaty and in absence of any FTS Article under the Tax Treaty, the income earned by us from AHL is not taxable in India."

20. Without prejudice submissions of the ld. AR on profits attributable to the Permanent Establishment:

"i.) Without prejudice to our submissions that we do not constitute any PE in India under the Tax Treaty, we enclosed the Audited Financial Statements of our Company for the calendar year 2008 and 2009.

ii). For both the years 2008 and 2009, we, Hyatt Dubai, have incurred a loss of AED 1,05,63,351 and AED 55,77,305 respectively.

iii.) HISWA has earned India sourced income of AED 39,30,711 (out of the total income of AED 1,10,73,562) as reflected in Notes to financial statements- Schedule 14 for the calendar year ending on 31 December 2008. Similarly, for the calendar year ending on 31 December 2009, the Company has earned India sourced income of AED 1,05,63,311 (out of the total income of AED 19,957,643) as reflected in Notes to financial statements- Schedule 14. In view of the same, it may be noted India sourced income approximately accounts for 35% and 52% of the total income earned by the Company for the calendar year ending on 31 December 2008 and 31 December 2009 respectively.

iv.) In view of above, keeping in mind the short notice to respond and ongoing holiday season, we submit that any allocation to our alleged PE as per Article 7 of the India- UAE tax treaty, in India could only be of proportionate losses from the aggregate losses incurred by us. We reserve the right to submit the working of apportionment of revenue, losses, etc., on financial year basis with respect to work done outside India and work done in India (by the alleged PE) in later stages of the proceedings."

21. He also argued that even as per disposition test or location test, the assessee has got no fixed place which can be geographically determined to have executed work from that fixed place. He also argued that power of disposition test could not be satisfied if the customer of an enterprise were to make available certain premises to the enterprise for use by the latter in accomplishing and planning etc. or performing specific work there. He took us to the order of the Assessing Officer at page 4, 5 & 6, which read as under:

"Fixed place of business- The submissions of the ld. AR
OECD commentary: Fixed place of business

The term "Place of business" covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. 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. It is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise. A place of business may thus be constituted by a pitch in a market place, or by a certain permanently used space 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.

As noted above, the mere fact that an enterprise has a certain amount of space at its disposal which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is therefore required. Thus, for instance, a permanent establishment could exist where an enterprise illegally occupied a certain location where it carried on its business.

Whilst no formal legal right to use a particular place is required for that place to constitute a permanent establishment, the mere presence of an enterprise at a particular location does not necessarily mean that that location is at the disposal of that enterprise. These principals are illustrated by the following examples where representatives of one enterprise are present on the premises of another enterprise. A first example is that of a salesman who regularly visits a major customer to take orders and meets the purchasing director in his office to do so. In that case, the customer's premises are not at the disposal of the enterprise for which the salesman is working and therefore do not constitute a fixed place of business through which the business of that enterprise is carried on(depending on the circumstances, however, paragraph 5 could apply to deem a permanent establishment to exist).

A second example is that of any employee of a company who, for a long period of time, is allowed to use an office in the head quarter of another company (e.g. a newly acquired subsidiary) in order to ensure that the latter company complies with its obligations under contracts concluded with the former company. In that case, the employee is carrying on activities related to the business of the former company and the office that is at his disposal at the headquarters of the other company will constitute a permanent establishment of his employer, provided that the office is at his disposal for a sufficiently long period of time so as to constituted a "fixed place of business"(see paragraphs 6 to 6.3) and that the activities that are performed there go beyond the activities referred to in paragraph 4 of the Article.

10. As can be seen from the above, the company always has a fixed place of business at its disposal throughout the year in Hotel premises, including the chambers of MD, and other

expatriates who were continually present. Fixed placed of business were available and at the disposal of the assessee, throughout the year as is evident from details of stay of these expatriates. Though the assessee purposefully restricted the stay of employees below specified period, yet it is clear that the premises/place were available to the assessee for entire duration from which it had carried out its activities for performing its obligation under the strategic oversight agreements.

A number of judicial precedents of commentaries have resulted in foundation of the principle that if a fixed place of business is available to the assessee and is at its disposal through which the assessee carries out its business fully or partly, then it would constitute a fixed place of business PE of the assessee.

11. In addition to the above, it is seen that the assessee has also been providing central reservation system (CRS) services, to the Hotel which in itself constitutes fixed place of business (PE).”

22. In addition, it is also noticed that the assessee has a PE in terms of Article 5(1) (i) which states that:-

“(i) the furnishing of services including consultancy services by an enterprise of a contracting state, provided that such activity continue for the same project or completed project for a period aggregating — 9 months within 12 months period.”

23. The assessee admits that it is rendering consultancy service but claims that its employees did not stay in India for a period aggregating 9 months. The contention of the assessee is incorrect as the operative word regarding duration is of the activities and not stay in India. As is evident from details of visits of employees they were involved in the project throughout the year. They had their actual physical presence in every month of the year under consideration.

24. The activities under the agreement were carried out throughout the year. It is of no relevance that employees came & left restricting their stay in India. But the activities undertaken by them in pursuance of consultancy services were continued throughout the year. Hence, it is also PE as per Article 5(1) (i) of Indo-UAE DTAA. Part of the scope of the activities under the agreement clearly qualifies to be treated as royalties under section 9(i) (vi) of the Act and Article 12 of the DTAA. Considering the narrow scope of the DTAA, the nature of activities may be examined under Article 12 thereof Article 12(3) defines royalties as:

> *"The terms "royalties" as used in this Article means payment of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematography films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience but do not include royalties or other payments in respect of the operation of mines of quarries or exploitation of petroleum or other natural resources."*
>
> *Reference may be made to the agreements as under:-*
>
> *In furtherance of the oversight and strategic planning services to be provided for the benefit of the Hotel pursuant to this Section 3. Strategic Provider shall provide to the Owner and the Hotel employees, exclusive use in the operation to the Hotel, the proprietary, written knowledge, skills, experience, operational and management information and associated technologies related to the operation of international, luxury full service hotels which Strategic Services Provider, and their affiliates have developed and accumulated over time as operators and managers of similar luxury, full service hotels throughout the world (collectively, "know- How"), subject to the provisions of Article IV. below. Owner hereby confirms, acknowledges and agrees that the Know-How and any expertise arising there from or relating thereto shall be used*

only in connection with the Hotel and shall be provided to Service Provider by Owner solely for such purpose. Any use of the Know-How outside the context set forth herein, shall be deemed a default by Owner, subject to the immediate termination of this Agreement by Strategic Services Provider, solely at its discretion. Particular areas of such knowledge, skills, experience, operation and management information and associated technologies that comprise the Know-How furnished under this Agreement are generally described in Appendix I, which forms an integral part of this Agreement."

25. Against the arguments of the ld.AR, Shri Gopal Dhal, the departmental Representative primarily argued that the interpretation that the minimum required period of nine months is applicable only with regard to Article 5(2), but there is no stipulation of minimum period of stay as per as Article 5(1) is concerned. Disputing the arguments of the ld. AR, he submitted a chart showing that the employees of the assessee company have been present throughout the year except for a period of 75 days. He argued that though individually nobody stayed for more than nine months, but if the aggregate is taken, employees of the assessee company have been present for a period of 290 days in India. He explained about the geographical test, business test and the duration test and argued that the employees of the assessee company have been working by placing themselves at the hotel of the Contracting State and hence, it can be said that they have a fixed place of business. He relied on the OECD commentary and Model Tax Convention and also on the judgment in the case of Formula One World Championships regarding fixed place of business. He submitted his arguments in written form which are as under:

"PRELIMINARY

1. The assessment order and the DRP directions /order of the CIT(A) are emphatically relied upon.

2. This submission is restricted only to specific aspects. On balance aspects, above orders and oral submissions are relied upon.
SUBMISSIONS
ISSUE OF PE under Art-5(1):

Art.- 5(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.

A. The geographical location or fixed-ness of the premises of Hotel was never in doubt and it can't be said that the premises are not geographically fixed. The only bone of contention is whether it was at the disposal of the assessee and the permanency of such place. The assessee contended that -

i. During the F.Y. 2008-09 relevant to A.Y. 2009-10, various personnel/employees of our company travelled to India and they stay in India for the purpose of rendering services aggregates to 158 days; /Para-vii of submission to the AO, PB-95)

ii. The stay of our employees in India did not exceed 9 months in any twelve months period as stipulated under Article 5(2)(i) of the DTAA /Para-viii of submission to the AO, PB-95)

iii. Under the agreement, we have no right to use the premises of AHL and no premises of AHL are at our disposal. /Para-xii of submission to the AO, PB-98)

iv. During the F.Y.2008-09, our employees are have travelled to India for rendering services to AFIL and number of days of service (part/full days and more than one project at a time) during the year aggregate to 158 days and this cannot be construed to satisfy the degree of permanency test for constituting Fixed Place PE under Article 5(1) of the DTAA. /Para-xix of submission to the AO, PB-99)"

26. The claim of the assessee that it didn't have a place at its 'disposal' is also examined in the following paragraphs on the basis of the facts of the case and from the perspective of the Hon'ble Supreme Court in the case of Formula One World Championships Ltd. (394 ITR 80)(FOWC) and eFunds IT Solutions (86 Taxmann.com 240)(e-Fund). It has been observed by Hon'ble Supreme Court in the case of FOWC (Supra) and further reconfirmed in the case of e-Fund (Supra):

> *"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'1, a "fixed place of business". This definition] therefore, contains the following conditions:*
>
> - *the existence of a "place of business", i.e. a facility such as premises or, in certain I instances, machinery or equipment.*
> - *this place of business must be "fixed", i.e. it must be established at a distinct place with a certain degree of permanence;*
>
> *- 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.*
>
> *34) The term "place of business" is explained as covering any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. It is clarified that a place of business may also exist where no premises are available or required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal. Further, it is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise. A certain amount of space at the disposal of the enterprise which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is required. Thus, where an enterprise illegally occupies a certain location where it carries on its business, that would also constitute a PE. Some of the examples where premises*

are treated at the disposal of the enterprise and, therefore, constitute PE are: a place of business may thus be constituted by a pitch in a market place, or by a certain permanently used area in a customs depot (e.g. for the storage of dutiable goods). Again the place of business may be situated in the business facilities of another enterprise. This may be the case for instance where the foreign enterprise has at its constant disposal certain premises or a part thereof owned by the other enterprise. At the same time, it is also clarified that the mere presence of an enterprise at a particular location does not necessarily mean that the location is at the disposal of that enterprise."

(Emphasis supplied)

27. The Hon'ble Supreme Court further explained that the term "Place" should be understood and interpreted in the context as well as through the lens of the object and purpose of Art-5 of OECD/UN MC rather than as per characterization from a purely legal (both common & civil) perspective. This is a reiteration of what Hon'ble Supreme Court had observed in the case of Azadi Bachao Andolan. In that case it was held that the principles adopted in interpretation of treaties are not the same as those in interpretation of a statutory legislation.

28. While commenting on the interpretation of a treaty imported into a municipal law, Francis Bennion observes:

"With indirect enactment, instead of the substantive legislation taking the well-known form of an Act of Parliament, it has the form of a treaty. In other words, the form and language found suitable for embodying an international agreement become, at the stroke of a pen, also the form and language of a municipal legislative instrument. It is rather like saying that, by Act of Parliament, a woman shall be a man. Inconveniences may ensue. One inconvenience is that the interpreter is likely to be required to cope with dis-organised composition instead of precision drafting. The drafting of treaties is notoriously sloppy usually

for a very good reason. To get agreement, politic uncertainty is called for.

- The interpretation of a treaty imported into municipal law by indirect enactment was described by Lord Wilberforce as being 'unconstrained by technical rules of English, or by English legal precedent, but conducted on broad principles of general acceptation. This echoes the optimistic dictum of Lord Widgery, C.J. that the words 'are to be given their general meaning, general to lawyer and layman alike…….7. the meaning of the diplomat rather than the lawyer'. [Francis Bennion: Statutory Interpretation, p. 461 [Butterworths,1992 (2nd Edn. "Emphasis supplied)

This is why a work-bench in a caravan, restaurants on a permanently anchored river boats, a transformer or generator on board a former railway wagon qualify as places. Taking the issue further, I may add, that's why a computer terminal (as in the case of Galilio/Travelport) or a computer server (as in the case of or Areva T&D AAR/876/2010) constitutes a PE whereas a Satellite transponder is not. Hon'ble Supreme Court further elaborated this concept with reference to "another competing enterprise." (para-37, FOWC)

29. The question is whether "at the disposal" denotes an absolute legal right/control over a place /room/cabin/space or it connotes only the right to access and use such place. Once the Hon'ble Supreme Court identified and clarified the dichotomy between the legalistic interpretation of the term 'Place" as a (bundle of rights of ownership to the exclusion of others, use, transfer as allowed by law) as against the interpretation as per OECD/DTAA and the characterization of "Place", (FOWC; Para-37 "The OECD view can hardly be reconciled with the two court cases.") it went on to analyze the concept of "Disposal". It highlighted the differences of opinions/approach in the method of interpretation of the concept as adopted by OECD - a Liberal Subsidiary Approach (i.e. PE should be treated like subsidiaries) as against a more Stricter and legalistic approach by the Canadian and Indian Courts as well as the differences in the

approach by the Indian Courts itself (i.e. Ericsson and another competing enterprise). The Hon'ble Supreme Court went on to build on and expand the concept as explained by Vogel i.e. "intensity of control" over the 'place' as the deciding factor for 'at the disposal' issue. It was recognized that this 'intensity of control' varies from activity to activity and depends upon the 'business activity' carried on by the enterprise from such place. As per Vogel "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 POB." This approach and methodology was confirmed by Hon'ble Supreme Court when it held:

> *"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 (as in the case of Showa), and the more they allow a parallel use of the same POB by other persons (i.e. employees of MSL), the lower are the requirements under the control test."*

30. The Hon'ble Supreme Court further went on to reconfirm the above approach i.e. "Intensity of Control" rather than "Exclusive, Rigid & Absolute Control" when it recognized that there are, however, a number of traditional PEs (like a small workshop of 10 or 12sq. meters or a room where the taxpayer runs a noisy machine) which by their nature require an exclusive use of POB by one taxpayer and/or his personnel. Moreover, this approach is also in conformity to and consistent with the approach expounded by Hon'ble Supreme Court earlier in the case of Azadi Bachao Andolan i.e. interpretation of treaty terminology not from a purely legal perspective. This approach to interpret the term "at the disposal of" also finds resonance in the words of noted taxation expert Michael Lang who in

his book "The OECD-Model-Convention and its update 2014" (Michael Lang and others, (edited) IFBD, Linde) observes-

> *"In the last decade the tendency to broaden the scope of Article-5(1) by extending the meaning of "at the disposal of" could be observed. The result is lowering of the threshold for the creation of a fixed place, from a right to control a place/ location of business to a more factual based approach, focusing on the ability of the enterprise to use a certain place for its activities. In 2003, the OECD incorporated the painter example in the commentary. According to that example, a painter who, for two years, spends three days a week in the large office building of his main client will constitute a PE. The presence of the painter in that office building where he is performing the most important functions of his business for the client will be enough to establish a PE. That example indeed shows a very broad understanding of the concept of permanent establishment as defined in Article-5(1). It no longer refers to a certain room or location over with the painter can exercise a minimum degree of power or at least can store his equipment. Instead, just the activities and presence at certain place over a sufficiently long period will be the decisive factor to create a PE.*
>
> *This expansion is further strengthened by another example provided, where a company engaged in paving a Road will constitute a PE. Following the OECD commentary, the words "through which" must be given broad interpretation in order to cover all business activities which are carried on at a particular location that is "at the disposal" of the enterprise for the purpose of performing such activities. The painter example does not offer any reference regarding the permission of the painter to enter a building, thus lacking of sufficient control over his assumed place of business. In that context it seems, that the mere performance of the business activity may constitute a PE according to the commentary, as long as an enterprise is exercising its business activity for a sufficiently long period of time. (P.244)*
>
> *The above observations show that the power to effectively control a location and the permanence of the business activities are interconnected issues. If an enterprise is able to exert a*

significant level of control over the place, the duration of an activity is less important in order to create a PE. In other words, if the effective control over a location is evident (e.g. in the case of a legal right to use a place), a relatively short time period will be enough to create a PE. On the other hand, if the activity is performed over a rather long time span, no distinctive right to use or access a place is required under the commentary in order to constitute a PE. In such a case a (low) degree of control over a place appears to be sufficient.

Obviously, the Working Party considers the period of presence in the country to be more important than the effective power over a specific place. It even seems that the condition of effective power to use a place is not required when the period of activity is long enough. This view is further supported by the fact that the Term " effective power to use a location" cannot be found in the first version of the Discussion Drafts and was just added in the revised version. Consequently, the permanence of a business activity at a location is the key factor in determining a PE according to the working party, outweighing the criterion of an effective control over a place, (p.247)"

31. Thus, the place of disposal should not be tested from the angle of 'exclusion of others' but from the perspective of type and duration of business carried on by the taxpayer from such place.

32. The contracts between the assessee and the owners, when analyzed/looked from the above perspective, reveals the following noteworthy features-

"Strategic Oversight Agreement dt. 04/09/2008
i. Art-II, Sec-1 Duration - 20 years [p.17]
ii. Art-Ill, Sec-1

- Hotel to be operated as a part of HI chain of hotels.[p.18]
- Owner hereby consents to the ownership, management, licensing and operation by HISWA. [p. 19] [This clause need to be read along with Sec-4 of Art-1 which provides that -

a. In case owner desires to avail loans/finance or use the hotel as collateral, the lenders must agree to the non-disturbance and attornment terms acceptable to the assessee (p,16)and
b. Lenders will adhere to the terms of this agreement and recognize assessee's rights pursuant to this agreement, (p.16-17)

iii. Art-Ill, Sec-2
- HISWA shall have complete control and discretion in formulating and establishing the overall general and strategic plan with regard to all aspects of the operation of the hotel.[p.19]

- Right of Owner to receive financial returns from the operation of the hotel shall not be deemed to give owner any rights or obligations with respect to the operation or management of the hotel other than as expressly set forth in this agreement, [p. 19]

33. As evident from the above, the agreement not only provides the assessee with an unrestricted right to access the hotel premises but also the complete control over such premises. This clearly establishes the fact that the hotel premises were at the disposal of the assessee in view of the length and duration of their use by the assessee and the less invasive activities being carried on there from. It can't be denied that the assessee had certain amount of physical space at its disposal in the form of hotel premises.

34. Now coming back to the "temporal" aspect or the "Permanency Test", it may not be out of context to highlight the fact that the temporal aspect of this concept has been largely diluted in view of the decision of Hon'ble Supreme Court in the case of Formula One World Championships (Supra). While elaborating the concept, the Hon'ble Supreme Court held-

"41 The High Court was also conscious of the fact that such an access or right to access was not permanent in the sense of its being everlasting. However, having regard to the model of

commercial transactions, such an access for a period up to six weeks at a time during the F-l Championship season was sufficient for the purposes of Article 5(1) of DTAA. Further, as the tenure of RPC was five years, it meant that such an access for the period in question was of repetitive nature."

35. The Hon'ble Supreme Court once again reiterated the above by observing that "68 (iii) The appellants are trying to trivialize the issue by harping on the fact that duration of the event was three days and, therefore, control, if at all, would be for that period only."

36. The Hon'ble Supreme Court accordingly proceeded to affirm the decision of Hon'ble High Court by observing as under-

"70) We are also of the opinion that the High Court has rightly concluded that having regard to the duration of the event, which was for limited days, and for the entire duration FOWC had full access through its personnel, number of days for which the access was there would not make any difference. This aspect is discussed by the High Court in the following manner, and rightly so:

"52. It is evident that for the duration of the event as well as two weeks prior to it and a week succeeding it, FOWC hand-full access through its personnel, the team contracted to it, both racing as well as spectator teams and could also dictate who were authorized to enter the areas reserved for it. No doubt, in terms of the agreement, i.e. RPC, Jaypee was designated as the promoter or the event host. A look at the RPC and its terms as well as the other terms contained in the agreement between the Jaypee on the one hand and Allsports, Beta Prema 2 as well as FOAM show that Jaypee's capacity to act - though it promoted the event, was extremely restricted. At all material times, FOWC had access - exclusively, to the circuit, and all the spaces where the teams were located. Jaypee created the circuit for the purposes of the event and other events; yet, during the event, i.e. the FI Championship, no other event was possible.

53. Having regard to the nature of the preceding discussion, it is evident that though FOWC's access or right to access was not permanent, in the sense of its being everlasting, at the same time, the model of commercial transactions it chose is such that its exclusive circuit access - to the team and its personnel or those contracted by it, was for up-to six weeks at a time during the FI Championship season. This nature of activity, i.e racing and exploitation of all the bundle of rights the FOWC had as CRH, meant that it was a shifting or moving presence: the teams competed in the race in a given place and after its conclusion, moved on to another locale where a similar race is conducted. Now with this kind of activity, although there may not be substantiality in an absolute sense with regard to the time period, both the exclusive nature of the access and the period for which it is accessed, in the opinion of the Court, makes the presence of a kind contemplated under Article 5(1), i.e. it is fixed. In other words, the presence is neither ephemeral or fleeting, or sporadic. The fact that RPC-2011's tenure is of five years, meant that there was a repetition; furthermore, FOWC was entitled even in the event of a termination, to two years' payment of the assured consideration of US$ 40 million (Clause 24 of the RPC). Having regard to the OECD commentary and Klaus Vogel's commentary on the general principles applicable that as long as the presence is in a physically defined geographical area, permanence in such fixed place could be relative having regard to the nature of the business, it is hereby held that the circuit itself constituted a fixed place of business.

71) A stand at a trade fair, occupied regularly for three weeks a year, through which an enterprise obtained contracts for a significant part of its annual sales, was held to constitute a PE. Likewise, a temporary restaurant operated in a mirror tent at a Dutch flower show for a period of seven months was held to constitute a PE.
72) The High Court has also referred to some of the judgments, which are of relevance. We would like to take note of those judgments as we had agreed with the conclusions of the High Court on this issue: In Universal Furniture Ind. AB v. Government of Norway25, a Swedish company sold furniture abroad that was assembled in Sweden. It hired an individual tax resident of Norway to look after its sales in Norway, including sales to a Swedish company, which used to

compensate him for use of a phone and other facilities. Later, the company discontinued such payments and increased his salary. The Norwegian tax authorities said that the Swedish company had its place of business in Norway. The Norwegian court agreed, holding that the salesman's house amounted to a place of business: it was sufficient that the Swedish Company had a place at its disposal, i.e. the Norwegian individual's home, which could be regarded as 'fixed'. In Joseph Fowler v. Her Majesty the Queen 1990 (2) CTC 2351, the issue was whether a United States tax resident individual who used to visit and sell his wares in a camper trailer, in fairs, for a number of years had a fixed place of business in Canada. The fairs used to be once a year, approximately for three weeks each. The court observed that the nature of the individual's business was such that he held sales in similar fares, for duration of two or three weeks, in two other locales in the United States. The court held that conceptually, the place was one of business, notwithstanding the short duration, because it amounted to a place of management or a branch having regard to peculiarities of the business."
(emphasis added)

37. As has been discussed earlier, the operating term of the lease is 20 years. It is not the contention of the assessee that the visits of its employees are "occasional". The visits are mandated by a written contract and have been historically going on at a regular basis year after year. Although the appellant claims that the visits are only for a limited period, the truth is that the employees of the assessee have been visiting the premises of AHL year after year. Thus, the visits of the employees are NOT sporadic or one off affairs and there is a continuity and repetitiveness to it.

38. The issue under consideration by the Hon'ble Bench is the existence of Fixed Place PE under Art- 5(1) and under Art-5(2)(i) of the DTAA involving physical presence beyond mandated periods. The assessee has repeatedly emphasized that ‘‘During the F. Y. 2008-09 relevant to A. Y. 2009-10, various personnel/employees of our company travelled to India and they stay in India for the purpose of rendering services aggregates to

158 days" (Para-vii of submission to the AO, PB-95) and "The stay of our employees in India did not exceed 9 months in any twelve months period as stipulated under Article 5(2)(i) of the DTAA" ('Para-viii of submission to the AO, PB-95). Thus, as can be seen, the assessee's contentions are primarily centered around the existence of PE under Art-5(2)(i) only. No substantive arguments have been advanced denying the existence of PE under Art-5(1) of the DTAA. What is more important in this context is not only the number of days, but the presence almost throughout the year and year after years. Thus, to quote from Hon'ble Supreme Court in the case of Formula One World Championships, the appellants are trying to trivialize the issue by harping on the fact that duration of the event was three days and, therefore, control, if at all, would be for that period only the presence is neither ephemeral or fleeting, or sporadic". The indicator is not the presence of the employees for short periods in one year, it's about the continuity and repetitiveness of such presence year after year. Considering the purpose for which such visits are necessitated, terms of contract as well as the period spent as per the statement enclosed to this submission, the visits are definitely not a "one-off"/ "temporary"/ "occasional"/ "ephemeral"/ "fleeting"/"sporadic" ones. Accordingly, considering the permanency, consistency and frequency of such visits, the temporal aspect of the disposal test is also satisfied.

39. This brings us to the third aspect of the PE i.e. whether it can be said that the business of enterprise is being wholly or partly being carried on through such place. The term "business" is not fully or exhaustively defined; accordingly, it has the meaning that it has under the domestic law of the state applying the tax treaty, plus professional and independent services, as explicitly provided for in article 3(l)(h) of the OECD Model. Coming to the nature of business of the assessee, it

describes its role is "to increase the efficiency and effectiveness of the services provided by the Hyatt Group to the Hotel Owners in South Asia and Gulf Co-operation counsel region." (PB, p.6) The terms of the Strategic Oversight agreement clearly brings out the features which ensure that the above objective of the assessee is fulfilled.

> *"Art-III*
> *i. Sec-1 Hotel to be operated as a part of HI chain of hotels. Owner consents to the ownership, management, licensing and operation by HISWA.*
>
> *ii. Sec-2 HISWA shall have complete control and discretion in formulating and establishing the overall general and strategic plan with regard to all aspects of the operation of the hotel. Right of Owner to receive financial returns from the operation of the hotel shall not be deemed to give owner any rights or obligations with respect to the operation or management of the hotel other than as expressly set forth in this agreement.*
>
> *iii. Sec-3 HISWA will formulate and establish the overall strategic plans - policies - processes - guidelines and parameters as per Hyatt Operating Standards.*
>
> *iv. Sec-6 Use/Advance own fund by HISWA to be reimbursed later, eligibility of Employees for social benefits of HI group, Tax free reimbursements etc.*
>
> *v. Sec-7 Owner can't unreasonably withheld or delay the appointment of GM & assignment of employees as full time members of Executive Staff*
>
> *Art-VI*
> *vi. Repairs & Maintenance of the Hotel [p.25] Art-VII*
> *vii. Sec-2 Provision of chain marketing, services, reservation services, gold passport services etc.[p.26-27]*
>
> *The AO in his order, as well as in my oral submissions during the course of hearing, have brought out how, the essence of the agreement between the assessee and AHL and the overwhelming and controlling power it allows to the assessee*

ensures the assessee achieve the above goal. The agreement allows and provides absolute control to the assessee over the day to day management, administration, finance and all other spheres of activity of the hotel, which is the source from which the assessee also earns its income. The assessee itself accepts that "During the F.Y. 2008-09 relevant to A.Y. 2009-10, various personnel/employees of our company travelled to India and they stay in India for the purpose of rendering services (which is the business and the source of income of the assessee) aggregates to 158 days; fPara-vii of submission to the AO, PB-95) It is not the contention of the assessee that "no business" is being run from the place. What is contended is that the period is less than the stipulated limits.

40. This Hon'ble Tribunal in the case of Qualcomm Incorporated (I.T.A. Nos.: 3701 and 3702/Del/2009, 5343/Del/2010 and 4608/Del/11) held that the term "Business" has a wider connotation and must be understood in that context. In that case, the Hon'ble Tribunal had held that "No doubt, manufacturing is an important part of business but the business per se is little more than manufacturing." Furthermore, as per the amended commentary of UN Model to Art-5 as reproduced by Hon'ble High Court in the case of eFunds IT Solution and others, "....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." In the present case, this is the only conclusion that can be drawn in the light of the terms and conditions of the agreement between the assessee and AHL as discussed above. Such a conclusion further draws its strength from the submissions of the assessee before AO [para-2(v) of letter dt. 26/12/2011, p.97 of PB] where it relied upon the following from the OECD commentary:

"A second example is that of an employee of a company who, for a long period of time, is allowed to use an office in the headquarters of another company (e.g. a newly acquired

subsidiary) in order to ensure that the later company complies with its obligations under contracts concluded with the former company. In that case, the employee is carrying on activities related to the business of the former company and the office that is at his disposal at the headquarters of the other company will constitute a permanent establishment of his employer, provided that the office is at his disposal for a sufficiently long period of time so as to constitute a 'fixed place of business'..."

41. The contractual obligations and the nature of activities that the assessee is engaged in clearly necessitate the active involvement of the assessee in the business of AHL and as a natural corollary, the presence of its employees in it. All the above clearly goes on to demonstrate and prove that the assessee had a place of business at the premises of AHL from where it can ensure and control that not only the hotel is run and managed to its satisfaction, but also the other associated processes towards the maintenance of standards and quality as well as the exploitation of its commercial rights are being carried on. The AHL thus, afford a live connection amounting to business connection. For the very same reason, AHL also constitute a permanent establishment of the assessee in India because the assessee virtually projects itself in India, through it. Coupled with this, the fact that the salaries of the employees were paid by the assessee and the employees also came and worked in the office of AHL in India; enjoyed perquisites from AHL establish that prima facie the office of AHL can be considered as a projection of the assessee in India. In view of the above, the conclusion drawn by the AO that the assessee carries on its business either wholly or partly through the fixed place and accordingly, the business premises of AHL constitute a PE of the assessee within the meaning of Art- 5(1) of DTAA should be confirmed.

42. As regards of existence of PE under Art-5(2)(i), the AO in para-5.2 [p.6-7] of his order has clearly proved that contention of the assessee is factually incorrect and the employees have stayed beyond the requisite period thereby establishing PE under Art-5(2)(i) as well.

43. It was argued that work-bench in a caravan, restaurants on a permanently anchored river boats, a transformer or generator on board, a railway wagon is also qualified as PE. Even a computer servicer and Satellite transponder can be treated as PE. Hence, keeping in view that the entire staff works from the premises from the Hotel in India, it can be safely presumed to be PE and fixed place of business in India.

44. Relying on the judgment in the case of Formula One World Championships Ltd., 394 ITR 80 (SC), it was argued that the assessee need not require to have control over the place but the assessee has got sufficient place at its disposal with unhampered ingress and intress.

45. Regarding as to how the place at the disposal of the assessee, he referred to page No. 17 of the paper book, part of agreement section 1. He argued that though the assessee is harping about the temporary stay of his staff as per Article 2 section 1 of the agreement between the assessee and the owner reveals that the agreement is for a period of 20 years. Quoting Article 3 section (4) at page 21 of the paper book, regarding the operating the bank accounts, he argued that the assessee having established policies with regarding to handling bank accounts for the hotel operation and the assessee will oversee implications and administration on a day-to-day basis. Relevant sections of the agreement are reproduced hereunder:

> *"WHEREAS, Owner desires to avail the strategic planning services from Strategic Services Provider and use the Know-*

How of Strategic Services Provider to ensure that the Hotel is developed and operated as an efficient and high quality international, upscale, full service hotel, and Strategic Services Provider desires to provide to Owner the strategic planning services and right to access and use the Know-How to be used solely in relation to the operations of the Hotel.

NOW THEREFORE, the parties hereto covenant and agree as follows:

ARTICLE I

The Site and Design, Construction, Equipping and Furnishing of the Hotel

Section 1. The Site.

The Hotel is located at Bhikaiji Cama Place, Ring Road, New Delhi-110 607, India ("Site"). Attached hereto and made a part hereof as Exhibit 1 is a correct and complete description of the boundaries of the Site.

Section 2. Construction, Furnishing and Equipping of the Hotel.

Owner has, at its own expense, constructed, furnished and equipped the Hotel, such that the Hotel would be in conformity with the standards consistent with "Hyatt Regency hotels in effect from time to time (collectively, "Hyatt Design Standards").

Section 3. Hotel.

Subject to the terms and conditions of the Technical Services Agreement, the Hotel shall consist of:

(a) the Site;

(b) a hotel building or buildings, completely air conditioned, with

(1) areas and facilities including, without limitation, the following:

(A) approximately five hundred twenty four (524) guest rooms and suites, each with bathroom,

(B) restaurants, bars and banquet, a ballroom, meeting and other public rooms,

(C) commercial space for the sale of merchandise, goodsor services,

(D) garage or other parking space for guests and employees,

(E) storage and service support areas,

(F) offices for employees,

(G) health (fitness and spa) and business centers, and

(H) recreational facilities and areas;

(2) appropriate millwork and all installations and building systems necessary for the operation of the building(s) for hotel purposes (including, without limitation, elevator, heating, ventilating, air conditioning, electrical including lighting, plumbing including sanitary, refrigerating, telephone and communications, safety and security, laundry and kitchen installations and systems);

(3) all furniture and furnishings, which shall include, without limitation, guest room, office, public area, and other furniture, carpeting, draperies, lamps and similar items;

(4) kitchen and laundry equipment;

(5) hotel equipment and adequate spare parts therefor, including, without limitation, (a) all equipment required for the operation of (i) guest rooms and suites, including, without limitation, televisions, mini-bars and safes, (ii) banquet rooms, (iii) employee locker rooms, (iv) a spa and (v) a health (fitness) center, (b) office equipment, including, without limitation, computer hardware and software as selected by Strategic Services Provider, (c) dining room wagons, (d) material handling equipment, (e) cleaning and

engineering equipment, and (f) motor vehicles as required for guest and employee transportation;

(6) dining room accessories, kitchen utensils, engineering tools and equipment, housekeeping utensils and miscellaneous equipment and accessories ("Ancillary Hotel Equipment"'):

(7) uniforms, china, glassware, linens and silverware and the like ("Operating Equipment");

(c) public grounds, gardens and other landscaping features and facilities;

(d) fully furnished accommodation with necessary related facilities which shall be furnished in accordance with H.I. standards and specifications for the residences of the general manager of the Hotel ("General Manager"): and

(e) such other facilities and appurtenances, as are necessary or desirable to meet the Hyatt Design Standards and the Hyatt Operating Standards (as defined below).

The items to be supplied by Owner under (3), (4) and, with the exception of spare parts, (5) of subsection (b) above are hereinafter collectively referred to as "Furnishings and Equipment".

Upon completion of the Hotel Expansion" (as defined in TSA), the Hotel shall include the Hotel Expansion.

Section 4. Title to the Hotel

Owner warrants that throughout the Operating Term (as defined below), Owner will maintain full ^ownership of the Hotel (or if Owner's right and interest in the Hotel is derived through a lease, concession or other agreement. Owner shall keep and maintain said lease, concession or other agreement in fill force and effect throughout the Operating Term), subject to Section 2 of Article XVI,

free and clear of any liens, encumbrances. covenants, charges, burdens or claims, except (a) any that do not materially and adversely affect Strategic Services Provider's performance of services for the benefit of the Hotel pursuant to this Agreement and (b) mortgages or other encumbrances that provide that this Agreement shall not be subject to forfeiture or termination, except only in accordance with the provisions of this Agreement, notwithstanding a default under such mortgage or other encumbrance. Notwithstanding the generality of the foregoing, in the event that Owner shall desire, through banks or other lenders, to finance the construction of the Hotel, or refinance the Hotel, or use the Hotel as collateral in connection with any of Owner's or its affiliate's borrowing for non-Hotel purposes, Owner shall first secure from any such lenders a non-disturbance and attornment agreement acceptable to Strategic Services Provider. Such agreement would provide that the lender or lenders (and their successors and assigns, including any person who may acquire the assets of the Hotel through a creditor action) will adhere to the terms of this Agreement following any foreclosure or similar action by the lender or lenders, and will recognize Strategic Services Provider's rights pursuant to this Agreement. Notwithstanding the foregoing, if the performance by Strategic Services Provider of any of its obligations under this Agreement is prevented or interfered by any lender or any lessor (if the Site is subject to a lease) as a result of any default or breach by Owner under the applicable loan or lease documents, respectively, then any such inability of Strategic Services Provider to perform its obligations, arising therefrom, shall not be deemed a default or a breach of this Agreement by Strategic Services Provider.

Owner shall timely pay and discharge any ground rents, or other rental payments, concession charges and any other charges payable by Owner in respect of the Hotel and, at its expense, undertake and prosecute all appropriate actions, judicial or otherwise, required to permit the operation of the Hotel as contemplated in this Agreement Owner shall further timely pay all real estate taxes, personal property taxes and assessments that may become a lien on the Hotel and that may be due and payable during the Operating Term, unless payment thereof is in good faith being contested by Owner and provided enforcement thereof is stayed.

ARTICLE II

Operating Term

Section 1. Operating Term.

The term of this Agreement shall commence upon the Effective Date and the initial Operating Term (as defined below) hereunder shall commence at the Formal Opening of the Hotel as established pursuant to the Addendum, and expire at midnight on December 31 of the calendar year that contains the later to occur of (i) the twentieth (20^{th}) anniversary of the date of the Formal Opening of the Hotel or (ii) the twentieth (20^{th}) anniversary of the date this Agreement is taken on record by the Department of Tourism of the Government of India, provided that if either such date shall occur after August 31 of the applicable calendar year, the term and the initial Operating Term shall expire on midnight on December 31 of the calendar year following the calendar year which contains the twentieth (20^{th}) anniversary of the Formal Opening of the Hotel or the twentieth (20^{th}) anniversary of the date of record, as applicable.

As used in this Agreement, "Operating Term" shall mean and include the initial operating term as aforesaid and any extension thereof.

Section 2. Extension.

Provided Service Provider is not in default under the terms of this Agreement and upon the mutual agreement of Owner and Service Provider, subject to the approval of the relevant Indian governmental authorities, the Operating Term, may be extended for one (1) period of ten (10) years. If the term is so extended, the Operating Term also shall mean the period of time by which the term of this Agreement is extended pursuant to this Section.

Section 3. Government Approval.

The effectiveness of this Agreement shall be subject to the approvals, if required, of the relevant departments of the various ministries and departments of the Government of India. Strategic Services Provider shall obtain, and Owner shall cooperate in obtaining, the required approvals of this Agreement In connection with such required approvals, Strategic Services Provider shall diligently pursue attainment of same and shall at all times, keep Owner informed as to the status of all such approvals. Notwithstanding the foregoing, until such time as this Agreement becomes effective, the Original Management Agreement shall remain in effect and Hyatt shall continue to provide the sales and marketing and management services set forth therein. Upon the effectiveness of this Agreement, the Original Management Agreement shall terminate immediately and the provisions of this Agreement shall supersede the Original Management Agreement and shall have the

effect of amending and restating the original Management Agreement.

With regard to the approval of the payment of Strategic Fees hereunder and payment of amounts payable under other agreements with affiliates of Strategic Services Provider (including without limitation Service Provider and HI), Owner shall be responsible for obtaining and maintaining all applicable licenses and permits (unless otherwise required by applicable laws) at the sole cost and expense of Owner, and Service Provider shall provide Owner with all requisite assistance and authorizations necessary to obtain such licenses and permits, and upon request by Strategic Services Provider, Owner shall furnish Strategic Services Provider with copies of all such authorizations.

Section 4. No Objection

Subject to Article XXI of the HOS Agreement, Owner hereby, irrevocably and unconditionally, consents to, and agrees at all times in the future to consent to, Strategic Services Provider and its holding or subsidiary companies, and any of its and their affiliates or group companies entering into any future ventures, collaborations, or tie-ups through investment in shares or debentures or technology transfer licenses or trademark licenses or grant of a franchise or entry into technical consultancy services agreements or entry into marketing/publicity agreements or entry into management agreements or investment by whatever name called with any other person or entity in India in the field of hotel, tourism sector and related businesses. On the Effective Date (and from time to time throughout the Operating Term promptly following Strategic Services Provider's request), Owner shall (i) provide Strategic

Services Provider its written irrevocable and unconditional no-objection/consent in the form set forth in Part I of Schedule A to this Agreement or such other form as may be required by Strategic Services Provider (or its holding or subsidiary companies, and any of its and their affiliates or group companies) for this purpose from time to time, and (ii) pass a resolution, in the form set out in Part II of Schedule A to this Agreement, of its directors at a board meeting or by circulation conveying its irrevocable and unconditional no-objection in this regard in favor of Strategic Services Provider, its holding or subsidiary companies, and any of its and their affiliates or group companies, and shall provide a certified copy of such resolution to Strategic Services Provider.

ARTICLE III
Operation of the Hotel

Section 1. Standards of Operation.

The Hotel shall be operated consistent with the standards comparable to those generally prevailing in international, "Hyatt Regency" hotels operated by H.I. and its subsidiaries and affiliates, and Strategic Services Provider shall provide, from time to time, strategic plans, policies, processes, guidelines and parameters such that the Hotel can be operated in a manner that is customary and usual to such an operation (collectively, "Hyatt Operating Standards" and, insofar as feasible and in Strategic Services Provider's opinion advisable, local character and traditions. Strategic Service Provider shall use its reasonable efforts to comply with the laws of India. Owner shall use reasonable efforts to comply with the laws of India and the performance of its obligations hereunder. Owner

acknowledges that it has selected Strategic Services Provider to provide strategic plans, policies, processes, guidelines and parameters in the operation of the Hotel in substantial part because of Strategic Services Provider's expertise in the management and operation of a chain of full service, upscale, international hotels and resorts, and the benefits which Owner expects to derive by including the Hotel as part of the chain of H.I branded hotels. Owner further acknowledges that it has determined, on an overall basis, that the benefits of operation of the Hotel as part of the H.I. chain of Hotels are substantial, notwithstanding that not all H.I. Hotels will benefit equally by inclusion therein. Owner further acknowledges that in certain respects all hotels compete with all other hotels and that conflicts may, from time to time, arise between the Hotel and other H.I. branded hotels. Strategic Services Provider agrees, however, that it shall use reasonable efforts to minimize conflicts among H.I-branded hotels, and will in all events proceed, both in its provision of services to the Hotel and j in the provision of services to other hotels, in a good faith manner and in a manner reasonably deemed to serve the overall best interests, on a long term basis, of all H.I.-branded hotels, including the Hotel; provided that the day-to-day management and operations of the Hotel are implemented in a manner consistent with the strategic plans, policies, processes, guidelines and parameters, rendered by Strategic Services Provider, from time to time. Owner hereby consents to the ownership, management, licensing and operation by Strategic Services Provider and its affiliates of other hotels, and to the addition of other hotels to the chain of H.I.-branded hotels, wherever located (including the operation or addition of other hotels or hotel chains that may otherwise be deemed competitive with the Hotel).

Section 2. Control of Strategic Planning of the Operation.

Subject to the terms of this Agreement, Strategic Services Provider shall have complete control and discretion in formulating and establishing the overall general and strategic plan with regard to all aspects of the operation of the Hotel, including, without limitation, branding, marketing, product development, and day-to-day on-site operations, as more particularly set forth in Section 3 below, and subject always to the last paragraph of Section 3. Nothing herein shall constitute or be construed to be or to create a partnership or joint venture between the Owner and Strategic Services Provider, and the right of Owner to receive financial returns from the operation of the Hotel shall not be deemed to give Owner any rights or obligations with respect to the operation or management of the Hotel other than as expressly set forth in this Agreement.

Section 3. Oversight and Strategic Planning Services.

Without limiting the generality of the foregoing, during the Operating Term, Strategic Services Provider shall, in consideration of the Strategic Fees and subject to reimbursement of its expenses as hereinafter provided, formulate and establish the overall strategic plans, policies, processes, guidelines and parameters, from time to time, all in accordance with the Hyatt Operating Standards. The maintenance of the Hyatt Operating Standards at the Hotel shall be subject to the availability of sufficient working capital and as provided in Section 1 of Article VII of this Agreement. The provision of such overall strategic plans, policies, processes, guidelines and parameters will, among other matters, cover:

(a) recruiting, interviewing and assistance in hiring the General Manager, and any other Hotel employees, to the extent of any such recruiting, interviewing and hiring needs to be conducted outside of India;

(b) formulating and establishing overall human resource policies consistent with Hyatt Operating Standards including, without limitation, selection, employment, training, allocation, transfer and termination of employment of all employees of the Hotel, the establishment of the conditions of employment, staffing list and salary and benefit structures, and formulation and establishment of training and motivational programs for employees such as the "Training for Your Future" program and other training and motivational programs implemented from time to time in hotels managed by subsidiaries of H.I.;

(c) establishing overall and strategic purchasing policies with respect to selection of goods, supplies (and suppliers) and materials, including without limitation food, beverages, operating supplies and expendables, Furnishings and Equipment and such other services and merchandise necessary for the proper operation of the Hotel, and as necessary, establishing policies to facilitate the purchase and procurement of utilities, equipment maintenance, telephone and other electronic communication services, vermin extermination, security protection, garbage removal and other services necessary for the operation of the Hotel;

(d) determining policies on (i) the terms of guest admittance, (ii) use of the Hotel for customary purposes, (iii) charges for rooms and Hotel services, and (iv) all phases of promotion and marketing of the Hotel, including without limitation sales and marketing policies, determination of annual and long-term objectives for occupancy,

rates, revenues, clientele structure, sales terms and methods, cash management policies, receipts of payments, collection of income and issuance of receipts for all services and any income from the operation of the Hotel;

(e) furnishing the sales and marketing services and centralized reservations services as provided for in Section 2 of Article VII:

(f) making available its own and its affiliated companies' personnel for the purpose of reviewing all plans and specifications for future alterations of the premises, and advising with reference to the design of replacement Furnishings and Equipment and the quantities required, and in general for the purpose of addressing operational problems and improving operations; and

(g) establishing such other policies and consulting cm the implementation of the same as are necessary, customary and usual in the operation of a hotel in accordance with the Hyatt Operating Standards.

In furtherance of the oversight and strategic planning services to be provided for the benefit of the Hotel pursuant to this Section 3. Strategic Services Provider shall provide to the Owner and the Hotel employees, for exclusive use in the operation of the Hotel, the proprietary, written knowledge, skills, experience, operational and management information and associated technologies related to the operation of international, luxury full service hotels which Strategic Services Provider, H.I. and their affiliates have developed and accumulated over time as operators and managers of similar luxury, full service hotels throughout the world (collectively, "Know-How") subject to the provisions of Article IV below. Owner hereby confirms, acknowledges and agrees that the Know-How and any expertise

arising therefrom or relating thereto shall be used only in connection with the Hotel and shall be provided to Service Provider by Owner solely for such purpose. Any use of the Know-How outside the context set forth herein, shall be deemed a default by Owner, subject to the immediate termination of this Agreement by Strategic Services Provider, solely at its discretion. Particular areas of such knowledge, skills, experience, operation and management information and associated technologies that comprise the Know-How furnished under this Agreement are generally described in Appendix 1, which forms an integral part of this Agreement.

From and after the Effective Date, Strategic Services Provider shall provide to Owner, through the General Manager, access to and the right to use the Know-How, solely as required in connection with the operation of the Hotel, in written form, by electronic mail, or in any other appropriate form depending on the nature of the Know-How. Strategic Services Provider shall additionally provide to Owner, through the General Manager, with the special purpose software to enable the use of certain Know-How, when necessary and to the extent required under the circumstances. Strategic Services Provider shall have the right to modify the Know-How in order to satisfy local requirements for operating the Hotel. Such modifications shall be made by Strategic Services Provider in its home country outside of India. Owner understands and acknowledges that Owner shall have no rights to the use of the Know-How, save for use thereof by Service Provider and the General Manager (and other Hotel employees under the supervision and with direction from Service Provider and the General Manager) in connection with the operation of the Hotel, as contemplated in this Agreement. Owner shall not

transfer, assign or encumber the rights or the Know-How provided under this Agreement to any of its affiliates or any third party by any means, including, without limitation, sublicensing to an affiliate or a third party, unless such transfer is expressly approved in writing by Strategic Services Provider, in advance.

Throughout the Operating Term, Strategic Services Provider shall keep Owner, through the General Manager, apprised of any and all improvements made with respect to the Know-How. These improvements shall be considered an integral part of the Know-How being provided hereunder and are therefore subject to the terms and conditions of this Agreement Strategic Services Provider shall provide to the General Manager, with such improvements to the Know-How free of any additional charge (other than the fees set forth herein). Owner acknowledges and agrees that throughout the Operating Term and upon the termination or expiration of this Agreement, ownership rights to the Know-How shall remain with Strategic Services Provider and its applicable affiliates.

Strategic Services Provider will have no obligation, and will not be expected to assign any of its employees to India on a permanent basis. If and when the need arises, Strategic Services Provider may elect, in its sole and absolute discretion, to assign to India one or more of its employees or the employees of its affiliates (including any H.I.-branded hotel) on an occasional basis only. Further, it is understood and agreed to by Owner that Strategic Services Provider, H.I., and their affiliates (other than Service Provider) will perform their duties hereunder from and out of their principal offices outside of India, and further that all duties related to the day-to-day

operations management assistance and technical assistance services as appropriate and required to operate and manage the Hotel within India shall be performed by Service Provider, employees of the Hotel, or their designees. It is further understood and agreed to by Owner that employees of Strategic Services Provider, H.I. and their affiliates will be in India only when, in the sole discretion of Strategic Services Provider, H.I. or their affiliates, their presence is required, and then only on a temporary basis.

Section 4. Operating Bank Account(s).

Strategic Services Provider shall establish certain policies with regard to the handling of operating bank accounts ("Operating Bank Accounts") for the Hotel's operations, which policies will be communicated to Owner, and Service Provider will oversee the implementation and administration of the same on a day-to-day basis.

Section 5. Agency Relationship.

In the performance of its duties hereunder, Strategic Services Provider shall act solely as the agent of Owner. All debts and liabilities to third persons (including, without limitation, H.I., or its affiliates) incurred by Strategic Services Provider in the course of the performance of its obligations under this Agreement shall be the debts and liabilities of Owner only and Strategic Services Provider shall not be liable for any such obligations by reason of its obligations under this Agreement Strategic Services Provider may so inform third parties of its relationship and may take any other reasonable steps to carry out the intent of this Section 5.

Section 6. Strategic Services Provider's Right to Reimbursement

During the Operating Term, Strategic Services Provider may elect to advance or to cause H.I. or any of its affiliates (collectively, "H.I Group'') to advance its own funds in payment of any costs and expenses incurred for the benefit of the Hotel operation in accordance with the provisions of this Agreement, (a) whether incurred (i) separately and distinctly from costs and expenses incurred on behalf of other hotels serviced by any member of the H.I. Group, or (ii) in conjunction therewith (including, without limitation, insurance premiums, advertising, business promotion, training and internal auditing programs, social benefits of the H.I. Group for which employees of the Hotel may be eligible, attendance of such employees at meetings and seminars conducted by members of the H.I. Group, and the Chain Marketing Services provided for in accordance with Section 2 of Article VIP, and (b) irrespective of whether such funds shall be paid to any third party or to any member of the H.I. Group or any other hotels operated or serviced by any member of the H.I. Group. If any member of the H.I. Group or any hotel operated or serviced by any member of the H.I. Group shall advance its own funds as aforesaid, it shall be entitled to prompt reimbursement therefor by the Hotel, and Owner shall ensure that they are promptly paid out of the Operating Bank Accounts. Notwithstanding the preceding, neither Strategic Services Provider nor any other member of the H.I. Group shall have any obligation to advance funds hereunder.

In addition to the other items described in this Section, Strategic Services Provider shall be entitled to reimbursement, at the then

current costs, for certain services, benefits or premiums including, without limitation, the following:

• internal audits, management operations reviews ('"M.O.R.s") and specialized training programs based on the executive time involved (averaging two to three (2-3) weeks per audit or M.O.R.) at the Hotel. As of the date of this Agreement, the time to conduct audits and M.O.R.S averages two to three (2-3) weeks per audit or M.O.R. and the per diem charges range from US$200 to US$350 (in 2008 Dollars) dependent upon the seniority of the executives performing the audit, M.O.R. or training.

• key executives' (including, without limitation, expatriate personnel's) social benefits, including, without limitation, life, disability and health insurance, incentive compensation and pension benefits arranged by Strategic Services Provider or H.I.

• premiums for the worldwide insurance coverage (including, without limitation public liability and crime insurance, such as employee fidelity and cash-in-transit coverage) maintained by Strategic Services Provider or H.I.

Reimbursable costs related to the above services, benefits or premiums shall be allocated in a reasonable manner determined by Strategic Services Provider and H.I., determined in good faith by Strategic Services Provider and H.I. with the intention of fairly allocating such costs to the benefited hotels.

Any such amount to be reimbursed to Strategic Services Provider or any other member of the H.I. Group in accordance with the provisions of this Agreement (including, without limitation, reimbursements due in accordance with Article XI below), shall be payable in United States Dollars without reduction for income, withholding, business tax, if any, value added or any other taxes

imposed by the tax authorities of the Government of India, any state, local or municipal taxing authority, or any agency or instrumentality thereof, or bank charges or any other charges, and in accordance with the approval of the Reserve Bank of India, if required. In the event that the tax authorities of India, any state, local or municipal taxing authority, or any agency or instrumentality thereof shall impose any income, withholding, business tax, value added or other tax upon such reimbursements of costs and expenses, or deem such reimbursements to be income taxable to Strategic Services Provider (or other member of the H.I. Group), or there shall be imposed upon such reimbursements any bank charges or other charges, then the amount of such reimbursements shall be increased by such amount as shall be necessary such that Strategic Services Provider (or other member of the H.I. Group) shall receive the same amount of reimbursements it would have been entitled to receive had such taxes, bank charges CM- other charges not been applicable or assessed. Owner hereby agrees and shall ensure that the amount of such reimbursements shall be withdrawn from the Operating Bank Accounts of the Hotel, utilizing such United States Dollars or other currency freely convertible into United States Dollars that may be available in such Operating Bank Accounts, or Rupee, converted to United States Dollars. If exchange control regulations of India delay the conversion of such amounts into United States Dollars, Strategic Services Provider (or other member of the H.I. Group) may elect to receive and retain such amounts in Rupee during the period of such delay, but such election shall not constitute a waiver of the right of Strategic Services Provider (or other member of the H.I. Group) to receive payment thereof in United States Dollars.

Section 7. Employees of the Hotel.

Strategic Services Provider shall, on behalf of and in consultation with Owner, identity, recruit and assist in appointing any non-local employees of the Hotel, including the General Manager, expatriate personnel, key executives and executive committee members. Notwithstanding the foregoing, Owner shall have the right to approve, which approval shall not be unreasonably withheld or delayed, the appointment of the General Manager. In addition, Strategic Services Provider shall formulate human resources policies to ensure consistency with the Hyatt Operating Standards. Strategic Services Provider or any of its affiliates (including hotels serviced or operated by such entity) may assign its employees temporarily as full-time members of the executive staff of the Hotel, in which case Owner shall, pursuant to a secondment agreement or an arrangement with the sending employer entity or hotel, reimburse the entity or hotel from which the employees were assigned monthly for the total aggregate compensation, including, without limitation, social benefits paid or payable to or with respect to such employees.

Section 8. Strategic Services Provider's Management Modules.

Owner acknowledges and agrees that all of management modules including, without limitation, policies and procedures, operations, accounting and training which are furnished by Strategic Services Provider for use at the Hotel as part of the overall general and strategic plans, policies, processes, guidelines and parameters of Strategic Services Provider shall be at all times, without further act or action, the exclusive property of H.I. Owner acknowledges and

agrees that consistent with the policies of H.I., Owner shall return (or the General Manager, on behalf of Owner shall return) such management modules to Strategic Services Provider upon the expiration or sooner termination of this Agreement, without any lien or charge.

ARTICLE IV

Infringement of Trademarks and Know-How

Owner shall promptly notify H.I. and Strategic Services Provider in writing should Owner become aware of any of the following matters, which may arise at any time during the Operating Term, as well as all particulars related thereto:

(a) any infringement or suspected or threatened infringement of the Trademarks or the Know-How, whether by reason of imitation or otherwise;

(b) any allegation or complaint made by any third party that the use by Owner of the Trademarks or the Know-How hereunder may cause deception or confusion to the public or otherwise infringe any third party's intellectual property rights; or

(c) any other form of charge or claim to which the Trademarks or the Know-How may be subject, provided, however, that Owner shall not make any admissions in respect of such matters other than to Strategic Services Provider, and provided further that Owner shall in every case furnish Strategic Services Provider with all information in its possession relating to such charges or claims.

H.I. and Strategic Services Provider shall have the right to take any and all actions relating to the Trademarks and the Know-How. In the event that H.I. or Strategic Services Provider commences litigation

with respect to the Trademarks or the Know-How, H.I. or Strategic Services Provider, as applicable, shall (i) reimburse Owner for all reasonable costs incurred by Owner in providing any requested assistance to H.I. or Strategic Services Provider in connection with such litigation, (ii) be entitled to control any such litigation, (iii) bear the costs and expenses in connection with any such litigation, and (iv) be entitled to all damages, including the attorney's fees and disbursements, awarded or obtained based on such litigation, except for any damages which are awarded in favor of Owner.

Owner acknowledges that use of the Trademarks or the Know-How in contravention of the License Agreement and this Agreement may cause irreparable damage to H.I. and Strategic Services Provider and the goodwill associated therewith. Owner further acknowledges that damages may not be an adequate remedy at law for any use in contravention of the License Agreement and this Agreement, and agrees that in the event Owner (i) is in material breach of the License Agreement and this Agreement, (ii) has been notified by H.I. or Strategic Services Provider of the existence of such breach and (iii) has failed to cure such breach within fifteen (15) days of such notice, then H.I. or Strategic Services Provider shall be entitled to equitable relief by way of temporary and permanent injunctions, specific performance and such other relief as any court of competent jurisdiction and arbitral tribunal may deem just and proper.

ARTICLE V

Strategic Fees

Section 1. Strategic Services Provider's Strategic Fees.

During the Operating Term and during the period of partial operations prior to the Formal Opening of the Hotel, if any, Strategic Services Provider shall be entitled to receive fees for strategic planning services and the access to the Know-How consisting of base fee ("Basic Strategic Fee") and incentive fee ("Incentive Strategic Fee"') components (collectively, "Strategic Fees"):

(a) Monthly, as a preliminary installment of its Basic Strategic Fee, an amount equal to five-tenths of one percent (.5%) of the cumulative Room Revenue (as defined below) during the then current fiscal year, after deducting from such Basic Strategic Fee payment all Basic Strategic Fee payments previously made to Strategic Services Provider during such fiscal year, and

(b) Monthly, as a preliminary installment of its Incentive Strategic Fee, an amount equal to seven percent (7%) of the cumulative Gross Operating Profit during the then current fiscal year, after deducting from such Incentive Strategic Fee payment all Incentive Strategic Fee payments previously made to Strategic Services Provider during such fiscal year.

For purposes of this Agreement, (i) "Room Revenue" shall mean all revenues and income of any kind derived from the rental of guest rooms and suites of the Hotel including any undistributed service charges relating thereto or arising therefrom) and the proceeds of use and occupancy (business interruption) insurance actually received (after deducting any necessary expenses in connection with the adjustment or collection thereof, (ii) "Revenue" shall mean the sum of Room Revalue and all other revenues and income of any kind derived directly or indirectly from the operation of the Hotel including, without limitation, service charges collected from guests

and not distributed to employees and rental or other payments from lessees or concessionaires (but not the gross receipts of such lessees or concessionaires) and any other proceeds (after deducting therefrom necessary expenses in connection with the adjustment or collection thereof) of use and occupancy (business interruption) insurance actually received and (iii) "Gross Operating Profit" shall be the amount derived from Revenue (as defined below) less the cost and expense of maintaining, conducting and supervising the operation of the Hotel (other than the expense of maintaining any retail or commercial space that is let out or in relation to which Owner has granted a concession to any third party), as such amount is calculated by the accounting staff of the Hotel and reviewed and approved by Strategic Services Provider.

Section 2. Payment of Fees.

The Strategic Fees shall be determined in Rupee and shall be payable in United States Dollars converted at the official rate of exchange, as quoted by the State Bank of India, prevailing on the date of such fees shall be remitted, which shall be not later than thirty (30) days after the end of each fiscal month. Owner acknowledges that it shall cause Service Provider to withdraw Strategic Fees from the Operating Bank Accounts of the Hotel (or if applicable the Pre-Opening Account) for remittance to Strategic Services Provider. If, for any reason, the Strategic Fees are remitted later than thirty (30) days after the end of the month in which such fees are earned, the fees shall be converted at the official rate of exchange prevailing on the dates when such fees were originally determined.

The Strategic Fees may be subject to the deduction of Indian income or withholding taxes as shall be applicable to income tax associated with such fees in accordance with the Indian taxation laws then in force and, if required, subject to the approval of the Reserve Bank of India. The Strategic Fees shall not be subject to any value added or other tax, levy, or assessment. If there shall be assessed against the Strategic Fees any value added or other tax, levy or assessment, the Strategic Fees shall be increased by such amount as shall be necessary such that Strategic Services Provider shall receive the same amount of Strategic Fees it would have been entitled to receive had such value added or other tax, levy, or assessment not been applicable or assessed. Payment of Strategic Fees shall be in accordance with the exchange control regulations then in force. In the event that Strategic Service Provider obtains a nil or reduced withholding order from the Indian Revenue Authorities, the income tax withholding shall be in accordance with the order. If after the Effective Date, any taxes, other than in relation to income taxes, are levied upon the Strategic Fees by India, or any state, local or municipal governmental authorities, or any agency or instrumentality thereof, such taxes shall be borne and paid exclusively by Owner. Each party also agrees to extend all support to the other party in connection with the foregoing and will comply in all respects with such laws, regulations and the orders relating to the foregoing.

Section 3. Year-end Adjustment

If, for any fiscal year, the Strategic Fees payable to Strategic Services Provider under Section 1 of this Article in accordance with the profit and loss statement certified by the independent public

accountant shall be less than the preliminary installments paid in accordance with Section 1 above, Strategic Services Provider shall repay the difference within thirty (30) days after receipt by Owner of said profit and loss statement. If, however, the Strategic Fees due in accordance with the profit and loss statement certified by the independent public accountant shall be more than the monthly payments paid in accordance with Section 1 of this Article, then Owner shall ensure that such difference be paid to Strategic Services Provider from the Operating Bank Accounts within thirty (30) days of the date of receipt by Owner of said profit and loss statement.

Section 4. Fiscal Years

Fiscal years under this Agreement shall coincide with and be identical to calendar years for all purposes, except that the first fiscal year shall be the period between the date of the Formal Opening of the Hotel and December 31 of the same year, unless the period is three (3) calendar months or less, in which event the first fiscal year shall be the period from the Formal Opening of the Hotel until December 31 in the next succeeding year and the last fiscal year, if the Operating Term shall be terminated prior to its expiry date including any extensions thereof, shall be the period between January 1 of the year of termination and the date of such termination.

ARTICLE VI

Repairs and Changes

Subject to the provision of adequate working capital by Owner pursuant to Section 1 of Article VII and except to the extent prohibited by a Force Majeure Event, Strategic Services Provider shall establish maintenance programs, from time to time, as

necessary with respect to the repair and maintenance of the Hotel, such that the Hotel shall remain in good order and condition, ordinary wear and tear excepted, recognizing the need to maintain the Hyatt Design Standards and the Hyatt Operating Standards.

ARTICLE VII
General Covenants of Strategic Services Provider and Owner

Section 1. Opening Inventories and Working Capital

Owner shall, in advance of the Formal Opening of the Hotel, and as required by Service Provider from time to time, provide sufficient funds for the initial bank accounts, house cash funds, and inventories of food, beverages and immediately consumable items, as may be necessary for the operation of the Hotel in a manner consistent with Hyatt Operating Standards, and shall throughout the Operating Term, at its sole expense, provide working capital sufficient to assure the timely payment of all current liabilities of the Hotel (including, without limitation, Strategic Fees and any payment or reimbursement for out-of-pocket and other expenses incurred by Strategic Services Provider, H.I. or any of their affiliates for the account of the Hotel in accordance with the terms of this Agreement or otherwise), and to assure the uninterrupted and efficient operation of the Hotel pursuant to the Hyatt Operating Standards and the performance by Strategic Services Provider of its obligations hereunder.

Section 2. Chain Marketing Services, Reservation Services and Gold Passport

Strategic Services Provider shall, in the operation of the Hotel and for the benefit of its guests, provide or cause its affiliates, Hyatt Chain Services Limited ("HCSL") and International Reservations Limited ("IRL") or other affiliates of Strategic Services Provider, to provide the following services outside of India, to the extent appropriate and furnished to other hotels operated by Strategic Services Provider and its affiliates. HCSL shall provide convention, business and sales promotion services (including, without limitation, the maintenance and staffing of H.I.'s home office sales force and regional sales offices in various parts of the world), publicity, public relations, and all other group benefits, services and facilities including, without limitation, institutional advertising programs (which exclude advertising programs in which only selected H.I. hotels participate in by mutual agreement, the cost of which programs are allocated amongst the participating H.I. hotels) (collectively, "Chain Marketing Services) IRL shall provide reservations services.

Neither Strategic Services Provider, HCSL nor IRL, nor any other affiliate of Strategic Services Provider shall receive any profit for the rendition of Chain Marketing Services or reservations services. HCSL shall, however, be entitled to be reimbursed for the Hotel's share ("Chain Allocation") of all costs incurred by HCSL, Strategic Services Provider or their affiliates, including, without limitation, salaries of officers or employees, in the rendition of said services, and IRL shall be reimbursed for reservations costs. The charges for Chain Marketing Services and for reservation services shall be made on the same basis as to the other hotels operated by H.I., Strategic Services Provider and their affiliates. The present formula (in 2008

Dollars) for Chain Allocation is based on US$394 per Hotel guest room, per annum, plus one percent (1%) of the Room Revenue of the Hotel per annum, during the Operating Term and during any partial operations conducted prior to the Formal Opening of the Hotel. During the Pre-Opening Period, the present formula (in 2008 Dollars) for Chain Allocation is based on US$394 per Hotel guest room, per annum, and shall be based upon the projected room count as set forth herein. The reservation charge is currently US$8 per gross reservation plus US$0.70 (in 2008 Dollars) per gross reservation processed through Strategic Services Provider's proprietary software database called SPIRIT/Reserve. The Chain Allocation formula and the reservations charge are subject to change, from time to time, in the future, but all hotels managed by H.I. and its subsidiaries are charged on the same basis. If Chain Allocation or the reservations charge to all H.I. hotels is reduced, the Chain Allocation and/or reservations charge to the Hotel shall be reduced, and if Chain Allocation and/or the reservations charge to all H.I. hotels is increased, Chain Allocation and/or the reservations charge to the Hotel shall be increased. Strategic Services Provider shall cause its affiliates, HCSL and IRL, to provide Owner with a copy of the audited annual expenditure statements for Chain Marketing Services and reservation services.

The amount to be reimbursed to Strategic Services Provider and/or its affiliates for Chain Marketing Services and reservation services shall be payable in the manner set forth in the last paragraph of Section 6 of Article III of this Agreement.

Quoting from the agreement different clauses pertaining to 28 years lease to work from hotel, day-to-day operation etc., they have to management bank account. Thus, the disposal test is satisfied.

46. Regarding temporal test, since the agreement is for 20 years, relying on page No. 178, he argued that the assessee had got PE. The premises were at the disposal of the assessee throughout the period and the employees go occasionally cannot be accepted. He argued that even if section 5.2(i) is also applicable, the employees of the assessee have stayed for more than 9 months, the Revenues had to be taxed in India. It was also argued that as per page No. 6 para 11 of the assessment order, the agreement is not for a project, but for running, maintaining and managing of the hotel.

47. Rebutting the arguments of the Revenue, the ld. AR argued reiterating that the ld. DR was wrong in interpreting Article 3 of section 1 of the agreement page 18. It is argued that the ld. DR was also wrong to say that the control of the hotel is in the hands of the assessee. In fact, the control of the hotel was in the hands of the owner, but the assessee is only extending contract and strategic planning as observed at page No. 19. Distinguishing the decision of Hon'ble Supreme Court in Formula One World Championships Ltd., 394 ITR 80 (SC), he says that what is to be seen is the real and dominant control whereas in this case, the real and dominant control is with the owner of the hotel and not with the assessee.

48. Hyatt Dubai being a tax resident of UAE and the provisions of the Treaty being more beneficial as compared to the Act, for the purpose of this Return, no income is chargeable to tax in India taking the beneficial provisions under the Treaty. Hence, the management fees received are not taxable in the assessment year under consideration.

49. The company neither has a fixed place of business/office/branch/place of management in India nor the presence of their employees or other personnel has exceeded 9 months (as stated in the Treaty entered into between India and UAE), in India within any twelve month period. Hence, it does not constitute a Permanent Establishment in India as contemplated under Article 5 of the Double Taxation Avoidance Agreement entered into between India and UAE."

50. In support of its claim of not having a PE in India, the assessee vide the letter dated 26.12.2011 made its submissions, which can be summarized as under:

> *"i) the assessee is engaged in rendering management and consultancy services in the Hotel sector,*
> *ii) under the agreements the assessee has provided strategic services in formulating strategic plans, policies, guidelines and parameters from time to time,*
> *iii) stay of the employees did not exceed 9 months,*
> *iv) the assessee only renders strategic oversight services under the agreement."*

51. The ld. AR has also cited case laws in favor of its argument that it does not have a PE in India. Some of the case laws relied upon are as under:

> *"i) decision of Hyderabad Tribunal in the case of ACIT v Viceroy Hotels,*
> *ii) decision of Uttrakhand High Court in the case of M/S BKI/HAM,*
> *iii) decision of Delhi Tribunal in the case of Motorola Inc.,*
> *iv) Judgement of Supreme court in the case of Morgan Stanley,"*

52. The case laws relied upon by the assessee have been carefully considered and as the facts in the instant case are different, therefore, ratio of the aforementioned cases does not apply.

53. The ld. DR argued that the reply of the assessee that it does not have a PE in India is not acceptable in view of the scope of activities undertaken by it as per terms of the agreement with the Hotels. The MD and the other key management personnel of the Hotel are employees of the assessee company. They were present at the Hotels in every month of the years for actually managing the day to day operations of the assessee to achieve the stated objective of conforming to International Hyatt Standards.

54. In terms of Article 5(1), a PE is said to exist in the other contracting stage when an enterprise of one of the contracting state has a fixed place of business in India, in that other contracting state, through which business is carried out wholly or partly.

55. Heard the arguments of both the parties and perused the material available on record.

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

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

use the premises and no premises of AHL was at their disposal, we find on going to the agreements and the work executed, that the premises of AHL was very much at the disposal of the assessee for carrying on their business. Thus, we find that the assessee has met the twin criterion of existence of a fixed place of business and carrying out of business from such fixed place of business as enunciated of the judgment of Hon'ble Supreme Court in the case of Morgan Stanley & Co. 292 ITR 416 (SC). The claim of the assessee that they did not have a place at their disposal cannot be accepted in view of the judgment of Hon'ble Supreme Court in the case of Formula One World Championships Ltd. 394 ITR 80, in the case of Azadi Bachao Andolan and also E-funds IT Solutions 86 Taxman 240. The facts on record undisputedly prove that the premises AHL are at the disposal of the assessee for conduct of their business. While coming to the issue of "at the disposal" in the premises is available for the assessee for running of their business even for a limited time it constitutes a PE. Further, we have examined the various clauses of SOA dated 04.09.2008. The SOA itself is for a period of 20 years when an agreement is made for such a long period of 20 years, whether it can be said to be a consultancy provided or use of rights whether intellectual or technical, or know-how or patent or license or otherwise is also examined.

57. The SOA defines that the owner AHL consents to the ownership management, licensing and operation by HISWA (the assessee). The SOA also clearly mentions that the HISWA will have complete control and discretion with regard to all aspects of operations of the hotel. It also mentions that the right of the owner AHL to receive financial returns from the operation of the hotel shall not be deemed to give the owner any right or obligations with respect to the operation or management of the hotel. These clauses clearly prove that the HISWA, the assessee is totally

involved in the maintenance and operations of running the hotel even allowing the owner a very minimal role. This also clearly establishes that the hotel premises were at the disposal of the assessee in view of the length and duration of the use of the premises. Even taking into consideration, the permanency test and the temporal aspects detailed by the Hon'ble Supreme Court in the case of Formula One World Championships prove that the assessee has got fixed place of business and can be considered having a permanent establishment in view of Article 5(1) of the DTAA.

58. With regard to the permanent establishment it has been examined whether the assessee has got PE in relation to Article 5(1) or Article 5(2) of the DTAA. Article 5(2)(i) stipulates a PE in case of the furnishing of services including consultancy services provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any 12 months period. Thus, the period of stay stipulated only in relation to invocation of Article 5(2) but not with regard to Article 5(1) of DTAA. Thus, we hold that based on the DTAA of Indo-UAE under Article 5(1), the assessee is having a permanent establishment in India.

59. Further, various clauses of SOA such as the AHL cannot unreasonably withheld or delay the appointment of GM and appointment of employees as full time members of executive staff goes to prove the extent of control and management of HISWA in the affairs of the running of the business. The agreement provides absolute control to the assessee over the day to day management administration, finance and all other sphere of the running of the hotel including opening and operating of the bank accounts. Thus, it cannot be held that the assessee is only giving

consultancy services to the hotel. Further, Section 2 pertaining to the control of strategic planning of the operation indicates that strategic service provider will have complete control and discretion in formulating and establishing the overall general and strategic plan with regard to branding, marketing, product development, day to day onsite operations. Such clauses which accord the assessee, HISWA complete control and discretion even at the exclusion of the AHL can only lead to a conclusion that the assessee is into full fledged operation and management of the hotel. The operations such as guest admission, charges for rooms, operating of bank account, overseeing, implementation and administration of the same on day to day account, recruiting, interviewing, hiring, establishing Hyatt operating standards, establishing purchasing policies with regard to selection of goods, supplies, food, beverages including vermin extermination, security, garbage removal are all managed and operated by the assessee. All these operations are controlled through the General Manager who in turn reports to the assessee in all aspects.

60. Based on the clauses of the Strategic Service Agreement and Strategic Oversight Agreements, we hold that the revenue's earned by the assessee are taxable under Article 12 of the DTAA. Regarding the determination of the profit, taken up at ground no. 4 by the assessee, we hereby hold that the taxable profits may be computed in accordance with the provisions of Section 44DA of Indian Income Tax Act and Article 12 of Indo-UAE, DTAA. During the arguments, it was also submitted that the assessee has incurred losses in the assessment year 2008-09. The assessee be given an opportunity of submitting the working of apportionment of revenue, losses etc on financial year basis with respect to the work done in entirety by furnishing the global profits earned by the assesse, so that the profits attributable to the work done by the PE can be

determined judiciously. The same may be considered while determining the taxable profits in India in accordance with the provisions of Section 90(2) of Indian Income Tax Act, 1961.

61. In the result, the appeals of the assessee are dismissed

(Order Pronounced in the Open Court on 04/12/2019).

Sd/-	Sd/-
(H. S. Sidhu)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 04/12/2019
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR