

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

**Before Sh. K. N. Chary, Judicial Member**

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

**(Through Video Conferencing)**

**ITA No. 727/Del/2017 : Asstt. Year : 2013-14**

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

**Assessee by : Sh. Ajit Kumar Jain**

**Revenue by : Dr. Prabha Kant, CIT DR**

**Date of Hearing: 22.02.2021**

**Date of Pronouncement: 12.03.2021**

**ORDER**

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

The present appeal has been filed by the assessee against the order dated 24.11.2016 passed by the AO u/s 144C(5)/143(3) of the Income Tax Act, 1961.

**Ground No. 1 - Alleged Permanent Establishment ('PE') in India of the Appellant under the Article 5(1) and 5(2)(i) of the India - UAE Tax Treaty ('Tax Treaty'):**

2. At the outset, it was brought to the notice of the Bench that the grounds raised in the appeal of the assessee for the assessment year 2013-14 stands adjudicated by the order of the Co-ordinate Bench of the ITAT for the assessment years 2009-10 to 2012-13.

3. The Id. DR has not disputed the factual position.
4. For the sake of ready reference and convenience, operative part of the order dated 04.12.2019 in ITA No. 579/Del/2013, 779/Del/2014, 1762/Del/2015 and 957/Del/2016 is being reproduced herewith.

*"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....."*

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

**Ground No. 3 - Erroneous alternative taxation of India source income as 'Royalty' under Section 9(1)(vi) of the Income Tax Act, 1961 ('the Act') and Article 12 of the Tax Treaty:**

5. At the outset, it was brought to the notice of the Bench that the grounds raised in the appeal of the assessee for the assessment year 2013-14 stands adjudicated by the order of the Co-ordinate Bench of the ITAT for the assessment years 2009-10 to 2012-13. It was submitted that the assessee incurred operating losses during the year.

6. The Id. DR has not disputed the factual position.

7. For the sake of ready reference and convenience, operative part of the order dated 04.12.2019 in ITA No. 579/Del/2013, 779/Del/2014, 1762/Del/2015 and 957/Del/2016 is being reproduced herewith.

*"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 assessed 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 assessee, 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."*

**Ground No. 4 - Erroneous addition of reimbursement of expenses of Rs. 2,27,576 to the income**

8. This ground is not pressed by the assessee.

9. In the result, the appeal of the assessee is partly allowed.  
Order Pronounced in the Open Court on 12/03/2021.

Sd/-

**(K. N. Chary)**  
**Judicial Member**

**Dated: 12/03/2021**

\*Subodh\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**