IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" DELHI
BEFORE SHRI C.L. SETHI AND SHRI K.G. BANSAL

ITA No. 5686(Del)/2010
Assessment year: 2007-08

GIL Mauritius Holdings Ltd., C/o SR Batliboi & Co., Golf View Corporate Tower-B, Near DLF Golf Course, Sector-42, Gurgaon.	Vs.	Assistant Director of Income-tax (International Taxation), Dehradun.
(Appellant)		(Respondent)

Appellant by : S/Shri Percy Pardiwalla,
Prashant Shah, Manoneet Dalal, ARs
Respondent by: Shri Ashwani Kumar Mahajan, CIT, DR

Date of Hearing : 29.08.2011
Date of pronouncement: 16.09.2011.

ORDER

PER K.G. BANSAL : AM

The assessee has taken up six grounds in this appeal. In the course of hearing before us, the ld. counsel for the assessee explained that three questions need to be decided for disposal of the appeal. These questions are –

(i) whether, the assessee has a Permanent Establishment ('PE' for short) in India;

(ii) if yes, whether the income ought to be computed under the provision contained in section 44BB of the Income-tax Act, 1961 ('the Act' for short); and

(iii) whether, the assessee is liable to pay interest u/s 234B of the Act?

1.1 The Assessing Officer had prepared a draft order on 31.12.2009, in which the total income was computed at Rs. 33,69,92,014/-. Directions were given to charge interest under sections 234B and 234C of the Act. The assessee objected to the draft order, therefore, she forwarded the order and the objections to the Dispute Resolution Panel, New Delhi ('DRP' for short). The ld. DRP passed the order u/s 144C on 31.08.2010, in which the draft order was approved. It has inter-alia been mentioned that the assessee has a PE in India in view of the decision of the Tribunal in the case of Fugro Engineering BV, ITA No. 269(Del)/2007. It has further been mentioned that in absence of any profit and loss account, the AO has rightly estimated the income at 25% of the total revenue. It has also been mentioned that it is premature at this stage to consider

directions regarding the levy of interest. Consequently, the AO has passed the order u/s 143(3) determining the total income as per draft order at Rs. 33,69,92,014/-. Directions have also been issued to charge interest under sections 234B and 234C of the Act. Aggrieved by this order, the assessee has raised aforesaid three questions for determination.

2. The facts of the case are that the assessee-company is a tax resident of Mauritius. The assessee company and BG Exploration & Production India Ltd. ('BG' for short) entered into an agreement on 20.11.2006. BG is a nominee of co-venturers company. It is incorporated under the laws of Cayman Islands, and has its principal office at BG House, Powai, Mumbai, India. BG is a co-venturers with ONGC Ltd., Reliance Industries Ltd., who are a party to production sharing agreement dated 22.12.1994 for Panna, Mukta and South Tapti contract areas. These three co-ventures have nominated the BG to get certain work carried out through the assessee-company regarding offshore transportation and installation of pipe lines. The terms are embedded in the agreement dated 20.11.2006 executed between the BG and the assessee-company.

2.1 The scope of work is mentioned in exhibit-A of the agreement. It is mentioned that the purpose of this section of the document is to provide the assessee-company a summery of pipe lines, riser and PLEM work to be performed by the hired Marine Vessel Spread. The work to be performed is specified or implied within this document specifications, drawings or can be reasonably inferred from other sections of this document as being necessary for completion of the work. The following work is to be carried out under the agreement from the Marine Vessel Spread:-

- "One new 20 inch MTA to TCPP infield pipeline 21,897 m long including stalk on risers
- Post burial of the MTA to TCPP pipeline from KP 0.205 to KP 21.629. There is no other pipe burial requirement.
- One new 4.5 inch instrument Air pipeline line piggy-backed to MTA-TCPP pipeline including tie-in to the pre-installed Risers and stabilization, if any of short section of the platform approach Pipeline resting on the seabed near platform locations before riser tie-in.
- Pre-sweep existing sand waves along the export pipeline route at two sections totaling approximately 5 km in export pipeline route.

- Executing the post trench and pre sweep work with ROTECH or suitable alternative equipment. Soil vane shear strength shall not exceed 50 Kpa, along the proposed Pipeline routes.

- One new 20 inch TCPP export pipeline 75,729 m long including stalk on riser.

- One Subsea check valve in the vicinity of TCPP.

- Two piled PLEM(s) (one each for two trunk-lines), with associated piping and valves, and sub-sea spool pieces in the vicinity of the tie-ins.

- One 20 inch spur line 3,756 m long from PLEM for 36 inch ONGC truck-line sub-sea tie-in to PLEM for 42 inch ONGC trunk-line sub-sea tie-in.

- All the final sub-sea tie ins between new final spool and existing 36 inch ONGC SBHT trunk line and the sub-sea tie in between new final spool and existing 42 inch ONGC SBHT trunk-line, including the interface and operability of existing valves on the ONGC facility shall be on day rate basis.

- Elevation of 36" and 42" sub sea tie in valves is higher than the elevation of all piping at 36" and 42" PLEM respectively.

- Based on Company performed dive assisted survey there is no leakage through the existing 36" and 42" sub sea tie in valves and these existing valve flanges at tie in points are in good order. However, in case of leakage, Company will be advised at the earliest for extent of resources to be deployed at site to meet any contingencies. Contractor shall deploy agreed resources at cost plus fee basis. Contractor will be compensated for cost and time, if any, for work to be executed under contingencies.

- PLEM installation does not include any leveling of the sea bed or any remedial work. However, any such leveling or remedial required due to any variance in Company Supplied sub sea data shall be dealt as per Contract.

The existing 36 inch and 42 inch ONGC trunk lines have tie-in laterals comprising tees and ball valves.

The MTA-TCPP pipeline associated with this work has to cross the existing STA infield pipeline. The export pipeline has to cross the existing 36" diameter ONGC trunk line.

The Contractor shall perform all work necessary to provide the Marine Vessel Spread for the safe installation, other than the work that is explicitly stated in this Contract that will be performed by the Company. The Contractor shall perform the work in full compliance with this Contract and have the full responsibility for performing the activities listed below:-

- Set up and manage all shore base facilities and equipment necessary to support the Work.

- Provision of system tools and support facilities necessary to plan, execute and complete the Work in a timely and efficient manner.

- Responsibility for the timely specification and delivery of all interface requirements, including those listed in the Interface Matrix, Appendix 3 to this Exhibit, to the Company and the Company's other contractors. The Contractor shall further notify the Company of all overdue, incomplete or missing interface information.

- Co-ordination and interface with the Company and the Company's other contractors and suppliers as directed by the Company, including:

Co-ordination with the Marine Warranty Surveyor regarding verification and approval of all sea transports and pipelay activities including all items relating to systems, equipment and vessels.

Co-ordination, interface and cooperation with Company's other marine contractors performing ongoing marine operations, e.g. deck and jacket (facilities) installation, drilling etc.

- Preparation and co-ordination of all documentation required by the Company to obtain the necessary approvals by the Authorities relevant to the Work.

- Procurement of all items required including provision of all necessary materials, systems, equipment, services, personnel and facilities relevant to the Work except where specified as being provided by the Company.

- All relevant pre-commissioning, inspection, testing and surveys on his own equipment and vessels and allowing surveys by the Company or its authorized representatives of Contractor's equipment, vessels etc., at any reasonable time.

- Participation with experienced operations personnel for acceptance of relevant systems and equipment during pre-commissioning and inspections of the Company provided items at the Company nominated fabrication sites and at any relevant suppliers' premises.

- Supply pipeline marine spread including pipelay barge/riser installation, cargo barges, diving support vessels, supply boats, anchor handling tugs, survey vessels, dredging/pre-sweeping spread, etc."

3. According to the AO, the assessee has a PE in India in terms of paragraph no. 1 of article 5 of the Double Taxation Avoidance Agreement

between India and Mauritius ('DTAA' for short). On the other hand, the case of the assessee is that it is a work of assembly or installation and, therefore, clause (i) of paragraph no. 2 of Article 5 is applicable. Since the work has not been carried out for more than 9 months, the assessee does not have a PE in India. In this connection, it has been submitted that the work was carried out between 01.12.2006 10.08.2007, as per submissions made before the AO, which have not been disputed by her. This period falls short of the prescribed period by about 20 days. Therefore, the assessee does not have a PE in India. The profit from laying the pipe lines is business profit. In absence of PE in India, such profit is not taxable in the source country.

4. The ld. counsel has drawn our attention towards paragraph nos. 1 and 2 of Article 5 of the DTAA, mentioned on page 2 of the assessment order. These paragraphs read as under:-

"ARTICLE 5- Permanent Establishment-

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

2. The term "permanent establishment" shall include-

a. a place of management;

b. a branch;

c. an office;

d. a factory;

e. a workshop;

f. a warehouse, in relation to a person providing storage facilities for others;

g. a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

h. a firm, plantation or other place where agricultural, forestry, plantation or related activities are carried on;

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

4.1 The ld. counsel submits that the assessee has its assets and personnel in India for laying pipe lines of about 21 kms. length so as to connect them with the existing pipe lines. Therefore, if we look to the provision contained in paragraph 1 only, it may possibly be inferred that the assessee has a PE in India. However, it may be considered at this stage whether a moving ship could be said to be a fixed place of business even under this paragraph. Nevertheless, the work carried out by

the assessee is a construction or assembly project, under which pipe lines are assembled, laid and connected with the existing pipe lines. Therefore, the provision contained in paragraph 5(2)(i) of the DTAA is applicable. Under this provision, the PE comes into existence only if the construction or assembly project continues for a period of more than nine months. The construction or assembly project of the assessee had actually been carried out for less than nine months. Therefore, the assessee does not have a PE in India.

5. In reply, the ld. CIT, DR submits that the provisions contained in Article 5 have to be read chronologically. Under paragraph no. 1, the PE has been defined to mean in an exhaustive manner to be a fixed place of business through which the business of the enterprise is wholly or partly carried on. Admittedly, the assessee has carried out the work of laying pipe lines from the vessel, which houses the personnel, machines and material. The ship is a fixed place of business through which the business of the assessee-company has been partly carried on. In this connection, it has been stressed that under this paragraph, the requirement is about permanency of the establishment as commonly understood, but no time period has been fixed on expiry of which the PE will come into existence.

Once the conditions of this paragraph are satisfied, the PE comes into existence and thereafter one need not go to any other paragraph of this Article. Paragraph no. 2 contains illustrations of the PE and that is why it has been worded in an inclusive manner. Under this paragraph, a construction or assembly project also constitutes the PE provided that the activity continues for a period of more than 9 months. This paragraph does not override paragraph no. 1, which contains the basic rule regarding existence of the PE. There is no word in it to show that it overrides paragraph no. 1. The OECD commentary clearly states that a fixed place of business does not require its existence for any specified length of time. However, if the place of business is moving, say as in the case of a road construction, the period of existence of the project comes into picture. In the case of Fugro Engineering BV, a ship has been held to be a fixed place of business even if it has to move along the site of work. Therefore, as per decision of the Tribunal in the aforesaid case, the assessee has a fixed place of business, which constitutes PE under paragraph no. 1.

6. In the rejoinder, the ld. counsel submits that the AO has not doubted that the work of assessee consists of construction or assembly project.

Paragraph no. 5(2)(i) specifically deals with such a project and, therefore, it overrides paragraph no. 1.

7. Coming to the decided case, the ld. counsel has distinguished the facts of the case of Fugro Engineering BV (122 TTJ 655). The facts are that the assessee is a non-resident company, incorporated under the laws of Netherland. The assessee earned revenue amounting to Rs. 7,52,08,201/- from three parties, ONGC, Cairn Energy and Ganesh Benzo Plast. It carried out geo-technical investigation at drilling locations, which included drilling and sampling for the ONGC. It carried out geo-physical and geo-technical site investigation for Cairn Energy. It also provided skilled facilities and capacity to perform work for Ganesh Benzo Plast. The work in respect of ONGC involved drilling and sampling of two bore holes, on-board laboratory testing and specialized analysis through risk assessment technique. The work continued for a period of 13 days in financial year 2000-01. The work in respect of Cairn Energy was taken up at eight sites in the Gulf of Khambat, involving investigational approach. It mobilized its own rig and vessel from Singapore for this purpose. The work continued for a period of 41 days. The work in respect of Ganesh Benzo Plast also involved geo-technical

investigation and geo-technical services on-board "Samundra Sarveshak" vessel. This work continued for 37 days. It is mentioned that the assessee has been undertaking these activities on an on-going basis and not as isolated works. It is further mentioned that no length of time is prescribed under paragraph no. 1. It has been held that in such a situation if the place of business is available to the assessee for the period in which the work can be completed, it shall constitute the PE. The case of the ld. counsel is that the work carried by Fugro Engineering BV was not regarding construction or assembly project. The work involved taking samples from various places and testing them so as to decide whether the site was suitable for extraction of hydrocarbon. On the other hand, the assessee is carrying on the business of laying pipe lines, which is in the nature of construction or assembly project. Such a project is specifically covered under article 5(2)(i), therefore, the ratio of the case of Fugro Engineering BV is not applicable.

7.1 Further reliance has been placed on the decision in the case of DCIT Vs. Subsea Offshore Ltd., (1998) 66 ITD 296. In that case, the assessee received a sum of Rs. 1,58,48,719/- from Mazagaon Dock Ltd. and Rs. 98,39,380/- from ONGC. In agreement with both the parties, the

assessee undertook the work of inspection and repairing of submarine pipelines network used in connection with oil and gas exploration. The work was undertaken with the help of a special remote controlled vehicle. The Tribunal referred to the provisions of paragraph no. 1 of Article 5, as existing at the relevant time, where the PE has been defined to mean a fixed place of business in which the business of the enterprise is wholly or partly carried on. It has been held that the PE denotes some fixed place of business which has some permanency, and it does not include in its ambit a moving vessel which operates near a fixed place and which does not belong to the assessee. The ld. DR distinguishes the case by mentioning that the provision of paragraph no. 1 as existing then used the word "in", while the word used in the DTAA is "through". The decision in respect of fixity of place in the case of a vessel comes in conflict with the decision in the case of Fugro Engineering BV.

7.2 The ld. counsel also relies on the ruling of the Authority for Advance Rulings in P. No. 24 of 1996, (1999) 237 ITR 798. Relying on the meaning of the word "fixed" in Shorter Oxford dictionary, it is mentioned that the word contains in itself the indication of a time limit for the existence of a place of business. This is quite independent of the

specification of a time limit under paragraph no. 5(2)(i) and 5(3). The meaning of this word has also been considered in Fugro Engineering BV, in which it has been held that if a place made available for sufficient time to carry on the work in which it can be completed, the place will be the fixed place of business. The Authority ruled that paragraph no. 1 sets out a general definition and paragraph no. 2 furnishes an inclusive definition of the PE. Some of the items mentioned in paragraph no. 2 do not make a reference to the time period but paragraph no. 5(3) of the U S Model in regarding to a building site, construction, installation project etc. contains time limit of more than 12 months for constituting the PE. Such a project cannot be treated as a PE unless the time criterion is satisfied even though it may fulfill the condition mentioned in paragraph no. 1. It may be mentioned here that in the case of Brown & Root Inc., (1999) 237 ITR 156, the ld. AAR ruled that the element of permanence in relation to an establishment, if any, would be attracted under article 5(2)(k) of the Indo-USA treaty only if the installation project continues for a period of 120 days.

7.3 Reliance has been placed on the case of Cal Dive Marine Construction (Mauritius) Ltd. in AAR No. 789 of 2008 dated 26.06.2009.

The assessee had entered into an agreement with Hindustan Oil Exploration Co. Ltd. ('Hindustan Oil' for short) for laying pipe lines under the sea and constructing the structures inclusive of pre-commissioning of the pipe lines for a lump sum consideration of US$ 5,91,74,200/-. Hindustan Oil wanted to set up gas processing facility in the Kaveri basin. Accordingly, it awarded contract to the assessee for carrying out the work of laying pipe lines under the sea. The work consisted of transportation and installation engineering, transportation, pre-trenching, pipe laying, back filling, installation, pre-commissioning, survey, erection, construction, testing and handing over services. The work was to be executed both within the outside Indian territorial waters. The assessee hired barges and tugs for carrying out the proposed work. It entered into contract with resident and non-resident contractors for supply of equipments, labour and services. The appendix to the contract furnished the description of milestones and dates by which the same should be achieved. The schedule of payment was in terms of percentage of contract price based on progress of work. The questions before the ld. Authority inter-alia were- (a) whether, the work undertaken can be said to be construction or assembly project, and (b) if so, whether it should necessarily continue for a period of more than nine months in order to constitute PE under article

5 of the DTAA? It has been held that the activities of welding the pipes brought to the site and laying them into the sea so as to establish connectivity from the well-head to the shore will fall within the description of both construction and assembly project. In this connection, a reference has been made to paragraph no. 17 of OECD commentary to the effect that the term "building site or construction or installation project" includes not only the construction of building but also construction of roads, bridges or canals, the renovation of buildings, roads, bridges or canals, the laying of pipelines and excavating and dredging. Coming to the interplay of paragraph nos. 5(1) and 5(2)(i), it was argued that the inclusive definition will only expand rather than restrict the meaning and amplitude of the preceding general expression or term. In other words, paragraph no. 1 cannot be down sized by referring to paragraph no. 2. However, having regard to the contextual setting of the two paragraphs, it has been held that too much emphasis cannot be placed on the fact that definition in paragraph no. 2 is inclusive in nature. Therefore, this inclusiveness of the definition in paragraph no. 2 should not come in the way of harmonious construction and contextual interpretation of the two paragraphs. Accordingly, it has been further held that the ingredient of fixed place of business in paragraph no. 1 runs through the entire gamut of

paragraph no. 2 while the particular instances of such fixed places are set out in the inclusive definition with a view to dispel any doubt as well as to make it more comprehensive in scope. Therefore, if the fixed place is in the nature of a building site or a place connected with construction or assembly project, the minimum duration was advisedly prescribed by the signatories to the treaty. The case of the ld. counsel is that the facts of this case are in pari-materia with the facts in the case of the assessee.

7.4 Reliance has also been placed on the decision of Mumbai Bench of the ITAT in the case of Poompuhar Shipping Corpn. Ltd. Vs. ITO (109 ITD 226). The assessee is a company incorporated in, and the tax resident of, Mauritius. It is engaged in the business of marine and general engineering and construction. During the year, it executed three projects for Arcadia Shipping Ltd, which inter-alia included replacement of B 121 main Deck with temporary Deck for a consideration of US$ 5,50,000. It was submitted that the income from this project was in the nature of business profit which could only be taxed if the assessee had a PE in India. Since it did not have a PE in India, the profit was not taxable in India. It was further submitted that the duration of the contract was only 100 days, which was lesser than the prescribed time limit of nine months.

The Tribunal came to the conclusion that the true tests for finding out the prescribed time limit must lie in examining whether or not the activities performed by the enterprise in various projects or sites are inter-connected and have to be necessarily regarded as a coherent whole. Unless the activities are of such a nature as to be viewed only in conjunction and as a coherent whole, there is no justification in aggregation of time spent on various business activities, sites or projects of the enterprise. For this purpose, it is immaterial whether the activities are carried out for the same or different principals. The relevant consideration is the nature of activities, their inter-connection and inter-relationship and whether the activities are required to be regarded as a coherent whole in conjunction with each other. Since the project did not satisfy the time criterion, it has been held that the profits cannot be brought to tax.

7.5 As mentioned earlier, the ld. DR had relied on the decision in the case of Fugro Engineering BV and according to him, even if the ship is moving along the path of pipelines, it would still be a fixed place of business. He also relied on the decision of Hon'ble Supreme Court in the case of CIT & Another Vs. Hyundai Heavy Industries Co. Ltd., (2007) 291 ITR 482. He stressed on the finding recorded in paragraph

no. 12 that when an enterprise sets up a PE in another country, it brings itself within the fiscal jurisdiction of that country to such a degree that such other country can tax all profits that the enterprise derived from the source country. It is the act of setting up a PE which triggers the taxability of a transaction in the source State. It is also mentioned that not all profits of the enterprise would be taxable in India, but only so much of profits having economic nexus with the PE in India would be taxable in India. The decision was rendered in a different context of taxation of profit from a turn-key project, yet we think it fit to reproduce the portion of the judgment relied upon by the ld. DR:-

> *"12. There is one more aspect to be discussed. The attraction rule implies that when an enterprise (GE) sets up a PE in another country, it brings itself within the fiscal jurisdiction of that another country to such a degree that such another country can tax all profits that the GE derives from the sources country- whether through a PE or not. It is the act of setting out a PE which triggers the taxability of transactions in the source State. Therefore, unless the PE is set up, the question of taxability does not arise- Whether the transactions are direct or they are through the PE. In the case of a Turnkey Project, the PE is set up at the installation stage while the entire Turnkey Project, including the sale of equipment, is finalized before the installation stage. The setting up of PE,*

in such a case, is a stage subsequent to the conclusion of the contract. It is as a result of the sale of equipment that the installation PE comes into existence. However, this is not an absolute rule. In the present case, there was no allegation made by the Department that the PE came into existence even before the sale took place outside India. Similarly, in the present case, there was no allegation made by the Department that the price at which ONGC was billed/invoiced by the assessee for supply of fabricated platforms included any element for services rendered by the PE. In the present case, we are concerned with assessment years 1987-88 and 1988-89. Therefore, we are not inclined to remit the matter to the adjudicating authority. We reiterate, in the circumstances, not all the profits of the assessee company from its business connection in India (PE) would be taxable in India, but only so much of profits having economic nexus with PE in India would be taxable in India. To this extent, we find no infirmity in the impugned judgment of the Tribunal. Accordingly, we are of the view that the Tribunal was right in holding that profits attributable to the Korean Operations was not taxable in view of Article 7 of CADT."

8. We may now examine the facts of this case in the light of aforesaid provisions and decisions. We have already reproduced the summary of the work to be performed by the assessee to be carried out through Marine Vessel Spread. The work is in the nature of services for laying pipelines, including temporary work to be performed and it has been more particularly described in exhibit-A. It includes all works which are

necessary for stability or for the completion, or safe or proper operation of the project as per scope of work in accordance with the contract. The site includes land, water and other places on, under, over, in or through which the work or any part of the work is to be performed including the installation site. The work is to be carried out through the Marine Vessel Spread which means all vessels used in the performance of work including but not limited to lay-barge, riser installation vessel, diving support vessels, pipeline tie-in vessels, survey vessels, tugs, cargo barges, supply boats, testing spread including drying equipment, and personnel. The assessee has completed the work in less than 9 months. The question before us is- whether, the assessee has a PE in India.

8.1 In the case of Fugro Engineering BV, the assessee was carrying on the business of testing the material obtained from the site for examining the possibility of having hydrocarbons. It had inter-alia to dig bores for the purpose of obtaining the material for testing. The same was later on tested on-board the ship. The work did not involve any construction or assembly project. The project was in the nature of carrying out chemical analysis to determine the extent of hydrocarbons available in the material obtained for testing. Obviously, paragraph no.

5(2)(i) or similar provision was not applicable to the facts of the case. The Tribunal, however, recorded a finding that the ship was a fixed place of business. It was available to the assessee for carrying on the business of chemical analysis without let or hindrance. Therefore, irrespective of time of presence in India, it constituted the PE. Accordingly, the profit attributed to the PE was held to be taxable in India. The case did not involve interpretation of paragraph no. 5(2)(i). Thus, on a prima facie basis, one can come to the conclusion that since the assessee had to carry out its work through the ship which could be done without let or hindrance, therefore, the ship is a fixed place of business. However, the case at hand involves construction of the treaty provisions contained in paragraph nos. 5(1) and 5(2) when these are read together.

9. The words "construction" and "assembly" have not been defined in the treaty. Therefore, the natural meaning of the words will have to be taken for coming to a proper conclusion. The word "construct", in so far as our context is concerned, has been defined in the New International Webster's Comprehensive dictionary of the English language, 2003 edition, to mean -(i) to put together and set up; build, arrange and (ii) to devise. The word "construction", therefore, means the act of

construction and the style of building. Normally speaking the word "construct" in respect of immovable property means the construction of buildings, dams etc. In the case of movable property, it may or may not include assembling of pipe lines. In this very dictionary, the word "assemble" has been defined to mean to fit or join together, as the parts of machine and, therefore, the word "assembly" means the act or process of fitting together the parts of a machine, etc., especially where such parts are machine-made in great numbers so as to be inter-changeable. The assessee is not assembling parts of a machine, but to our mind these words have been added in the dictionary by way of illustration. Putting together the pieces of pipe lines in a desired manner, according to us, would amount to "assembling". The ld. AAR has come to a similar conclusion in the case of Cal Dive Marine Construction (Mauritius) Ltd. (supra). We tend to agree with this interpretation. Accordingly, it is held that the assessee is carrying on the business of assembling pipe lines.

10. The only issue now left is regarding the inter-play of paragraph nos. (1) and (2). As mentioned earlier, the ship remained in territorial waters of India for such length of time in which the work of assembling the pipe lines could be completed. The work also continued for sufficient length of time, but statedly not exceeding nine months. Therefore, if the ratio of the decision in the case of Fugro Engineering BV (supra) only is taken into account, this will be a fixed place of business under paragraph no. (1). This is the view expressed by the ld. CIT, DR. His further case is that once the test of "fixed place of business" is satisfied under paragraph no. (1), there is no need to go to paragraph no. 2(i). The decision of the ld. AAR is in contradiction of the aforesaid view. It has been held that the two paragraphs have to be read together. Paragraph no. 2(i) specifically deals with construction or assembly project or supervisory activities in connection therewith. If the matter is concluded under paragraph no. (1), this paragraph becomes otiose for the reason that all construction or assembly projects will have a fixed place of business. Therefore, it would be difficult to read any residuary meaning in this paragraph. The ld. DR has also distinguished the decision in the case of Subsea Offshore Ltd. (supra) as the word used in the treaty at that point was "in" and not "through", therefore, it was held that a

moving ship operating along with the fixed place of business did not constitute PE. In this connection, we are of the view that the words "fixed place" do not represent a point in space but an area in space, which is available to the assessee for assembling the pipe lines. Nonetheless, the work done by the assessee is of assembling the pipe lines and the issue is regarding harmonious interpretation of paragraph nos. (1) and (2). In this situation, we tend to agree with the ld. AAR that if we stop at paragraph no. (1), paragraph 2(i) of the DTAA becomes otiose. This would not be a proper way of construction of the DTAA. The contracting parties included within the definition of the PE only those assembly projects which lasted for more than 9 months. This has been specifically provided in the treaty. This leads to an inference that if an assembly project lasts for less than nine months or nine months, there would be no inference of PE. It is held accordingly.

10.1 The ld. CIT, DR submitted that the issue regarding the period of continuation of the activities has been stated to be less than nine months by the assessee. On the basis of data furnished by it, the period falls short only by about 20 days. The lower authorities have not examined this fact as they have not considered the provision contained in

paragraph no. 5(2)(i). Accordingly, it is argued that in case the main question is decided in favour of the assessee regarding application of paragraph no. 5(2)(i), the exact period of continuation of activities will have to be ascertained. This has not been done by any of the lower authorities for the simple reason that they have not gone into this provision at all. On the other hand, the ld. counsel referred to the submissions made before the AO on 16.12.2009 that the presence of the assessee in India was for a period of less than nine months. Having considered the rival submissions, we are of the view that since this submission has not been examined by any of the lower authority, it will have to be done now, as the question of PE crucially hinges on the period of existence of the assessee in India. Accordingly, this limited issue is restored to the file of the AO to ascertain the period of the existence of the assessee in India and thereafter decide the existence of PE as per our finding furnished in paragraph no. 10 (supra).

11. Since question no. (i) framed by us at the beginning of this order has been decided in favour of the assessee, it is not necessary for us to go into question nos. (ii) and (iii).

12. In the result, the appeal is treated as allowed as indicated above.

Sd/- sd/-

(C.L. Sethi) (K.G.Bansal)
Judicial Member Accountant Member
SP Satia
Copy of the order forwarded to:-
GIL Mauritius Holdings Ltd.,C/o SR Batliboi & Co., Gurgaon.
Asstt. Director of Income-tax, Intl. Taxation, Dehradun.
CIT(A)
CIT
The DR, ITAT, New Delhi. Assistant Registrar.