AUTHORITY FOR ADVANCE RULINGS (INCOME TAX), NEW DELHI

Golf In Dubai, In re*

JUSTICE P.V. REDDI, CHAIRMAN

AND A. SINHA, RAO RANVIJAY SINGH, MEMBER

A.A.R. NO. 770 OF 2008

OCTOBER 13, 2008

RULING

Rao Ranvijay Singh, Member. - The applicant, Golf In Dubai, LLC (GID), is a company registered in United Arab Emirates (UAE), having its registered office in Dubai. The applicant states that it is engaged in the business of promoting Golf nationally as well as internationally by way of organizing Golf tournaments in different countries. The applicant's role is that of an event organizer who earns income by way of organizing such events. The applicant has reportedly got affiliations with the European Professional Golf Association (EPGA) by virtue of which many of the tournaments organized by GID are recognized as "European Tour events", being extremely prestigious events with the participation of the top ranking international Golf players.

2. In keeping with the aforesaid objective of promoting Golf tournaments worldwide, the applicant organized two Golf tournaments in India. The first one known as EMAAR-MGF LADIES MASTERS, 2007 was organized in Bangalore at Eagleton, the Golf Resort (Eagleton) from 3-12-2007 to 8-12-2007. The second tournament, known as EMAAR-MGF INDIAN MASTERS, was organised on the Golf course of the Delhi Golf Club (DGC) in February 2008, i.e., from 4-2-2008 to 10-2-2008.

3. For organizing the tournaments at Delhi, the applicant had entered into formal Venue Agreement dated 30 January, 2008 with DGC and had agreed to pay DGC a fee of US$ 80,000 in consideration of granting of the right to use the premises (of DGC) to host the event which was sponsored by EMAAR-MGF, an Indian company along with OMEGA and CNN as co-sponsors. The applicant entered into a formal agreement with EMAAR-MGF also for three years from 2007 presumably with an eye on such future Golf tournaments. No formal venue agreement seems to have been entered into with Eagleton, which is reportedly a division of Chandeshwari Build Tech Pvt. Ltd., an Indian company incorporated on 29-6-1994. In pursuance of the oral agreement, GID paid US$ 15,000 as venue charges fees for obtaining the right to use the Eagleton. Incidentally, no ticket income was generated from both these tournaments, as entry was free.

4. Since GID did not have, as stated, any Permanent Establishment in India, these tournaments were organized on 'remote basis', i.e., by hiring independent third party local contractors and suppliers, having local expertise and experience. In fact, GID entered into a formal agreement with one consultant company of Kolkata, namely Par Golf Tours & Accessories Pvt. Ltd. (Par Golf) which had requisite experience of organizing such events in the past. GID made total payments (after withholding tax) to Par Golf who provided the services in relation to organizing the events. As stated in the application, GID proposes to continue organizing such events in future also so that India is publicized as a venue for international Golf tournaments.

5. In the wake of organizing both these tournaments as referred to above, the applicant has received the following income from the Indian sponsors:—

(i) Sponsorship fee, which essentially represents reimbursement expenses on prize money, accommodation for players, Golf course fee, catering, advertisements and publicity expenses etc.

(ii) The management fee, which represents the actual fee for organizing the tournament, and

(iii) Income from sale of merchandise at the venue and over the internet.

6. Placed in the above factual matrix, the applicant seeks advance ruling on the following questions :—

(1) Whether Golf In Dubai ('GID/the Applicant') could be deemed to have a Permanent Establishment ('PE') in India in terms of Article 5 of the Double Tax Avoidance Agreement, entered between the Government of Republic of India and the Government of United Arab Emirates ('India-UAE DTAA')?

(2) Whether Eagleton The Golf Resort, Bangalore and/or the Delhi Golf Club could be deemed to be an agency PE of GID in India since the tournaments were held at grounds of each of these clubs and/or for providing ancillary assistance to GID in organizing the Golf tournaments?

(3) If the answer to any of the queries above is in affirmative, whether any or all of the following income generated by GID from the Golf tournament held in Delhi and Bangalore would be liable to tax in India in terms of Article 7 of the India-UAE DTAA?

(i) sponsorship income and a nominal management fee from Indian as well as foreign sponsors; and

(ii) income from sale of merchandise at the venue and over the internet.

(4) In the event that GID does not have a PE in India, would any of the income arising to GID under any of the above heads be taxable in India under any other provision of the India-UAE DTAA?

Arguments on behalf of the applicant

7. Arguing on behalf of the applicant, Mr. H.P. Ranina, the learned Advocate, emphasized the aspect that the applicant does not have

Permanent Establishment ('PE') in India both in terms of Article 5(1) and 5(2)(i) of the Double Taxation Avoidance Treaty between India and UAE (henceforth referred to as 'the Treaty') and in the absence of a PE, even if the income earned is regarded as business profits under Article 7 of the Treaty, no tax is payable by the applicant in the Contracting State i.e., India. Mr. Ranina argued that the applicant does not have a 'fixed place of business through which the business of the applicant is wholly or partly carried on in India'. It has been submitted that the phraseology 'fixed place of business' connotes a specific geographic location of the enterprise whose activities at that location must endure for more than a temporary period, say, generally for more than six months. In the present case, the learned counsel contends that the so-called business of organizing the tournament lasted only for six-seven days and as such the requisite degree of permanence is conspicuous by its absence. According to the learned counsel, the concept of PE, as enshrined in Article 5(1) of the Treaty, embodies periodicity/regularity and in the case of the applicant, the business of organizing Golf events has neither been carried on regularly nor there is certainty that it will be carried on regularly. Thus, it has been contended that the requirements of Article 5(1) of the treaty do not stand satisfied in the instant case. Similarly, as emphasised, Article 5(2)(i) of the Treaty also comes to the aid of the applicant in the sense that the applicant's employees or other personnel did not stay in India for furnishing services for a period aggregating to more than nine months within any twelve month period. There is accordingly, no Service PE of the applicant. Further, there is no Agency PE also in this case as various third party vendors with whom GID had entered into arrangements for organizing the tournament, both in Bangalore and Delhi, were independent contractors who acted in their ordinary course of business operations. In fact, none of these vendors can be termed as dependent agents who can act on behalf of the applicant and have an authority to conclude contracts on behalf of the applicant. In this

regard, the learned counsel has also placed reliance on two decisions of the Authority for Advance Rulings - the first being the case of AL NISR Publishing, In re [1999] 239 ITR 879 (AAR) and the second being that of Speciality Magazines (P.) Ltd., In re [2005] 274 ITR 310 (New Delhi) where the concept of Agency PE has been dealt with.

8. Summing up the arguments on the existence of PE, Mr. Ranina concluded that in the absence of a PE, the business receipts cannot be taxed here in India in terms of Article 7 read with Article 5 of the Treaty. It has further been argued that the sponsorship fees and the management fees cannot either be characterized as 'Royalty Income' or Fees for Technical Services (FTS) in consonance with the provisions of the Treaty. Going by the definition of Royalty as contained in the Article 12(3) of the Treaty, these payments, as per Mr. Ranina, are not received as a conside-ration for the use of or the right to use any patent secret formula or information concerning any industrial or commercial experience. GID, as stated by the counsel, is, no doubt, possessed of commercial experience, but the same has not been imparted to any third party and so, the payments received by GID do not fall within the four corners of Royalty income as contained in the Article 12(3) of the Treaty. Further, as the Treaty between India and UAE does not have any specific mention of the income by way of FTS in Article 12, the learned counsel argued that these receipts cannot be taxed under the head 'FTS'. Even Article 22 of the Treaty relating to residuary Income (other income) will not rope in such receipts under FTS, contends Mr. Ranina.

Revenue's Arguments

9. Assailing the stand of the applicant, Mr. Sanjeev Sharma, the learned departmental representative, strenuously contended that the applicant has got a PE in India primarily under Article 5(1) of the Treaty. According to

the revenue, the 'fixed place of business' in the case of the applicant is the Golf course of the DGC and the Eagleton through which the applicant's business has been carried on, though for 6-7 days only. As argued, GID proposes to organize similar Golf tournaments in India on annual basis in pursuance of the formal agreement with DGC and EMAAR-MGF. To be precise, Golf tournaments are stated to be organized in 2009 and 2010 also. That being so, a pattern of regularity in holding such events is also clearly discernible. Since the Golf courses are the 'fixed place of business' through which the applicant carries on the business of organizing Golf events regularly, the applicant has, as emphasized, got a PE in India in terms of the paragraph (1) of the Article 5 of the Treaty. Reliance has been placed on paras 4, 4.1 and 4.6 of the OECD commentary wherein it has been stipulated that even if an enterprise has a certain amount of space at its disposal which is used for the business activities, it is sufficient to constitute a place of business and no formal legal right to own the place is required. Relying on the commentary by Klaus Vogel on Double Taxation Convention, the revenue has argued that regularly maintaining the same pitch in a market place for a weekly market would be enough to constitute a 'fixed place of business'.

10. Expanding the arguments, Mr. Sanjeev Sharma relied extensively on the extracts (para 10.2) from the book titled "Permanent Establishment' by Mr. Arvid A Skaar to drive the point home that if a businessman operates regularly from a specific spot, for example a shoeshine in the street, he will also have a place of business therein, constituting a PE. The revenue buttressed its contention by relying on an example given by Prof. Skaar that a salesman lived in Netherlands and travelled every week to three markets in different towns in Germany, where he (the salesman) erected his sale-stand. The stand was normally put up on the same spot in the markets and the salesman did not use any building or other construction fixed to the soil.

The vendor also spent one day a week in Germany for stocking up and preparation for the week. In this given set up of facts, the court held that a PE, both under German domestic law and the Tax Treaty, presupposed a certain connection to the soil and a spatial delimitation of the place where the business was performed. The market vendor had his sale-stand on the same spot and within the same three markets and in such factual scenario, a PE was found to exist. In fact, even movable places of business may constitute a PE if they have a temporary location, contends the revenue.

11. As contended, the availability of the Golf Courses, to GID, both at DGC and Eagleton, even for 6-7 days only is a sufficient time frame to impart an aura of permanency as envisaged in the phraseology 'fixed place of business'. For this averment, the revenue has relied on the following extract from Prof. Skaar's aforesaid book :—

"6. Since the place of business must be fixed, it also follows that a permanent establishment can be deemed to exist only if the place of business has a certain degree of permanency, i.e., if it is not of a purely temporary nature. A place of business may, however, constitute a permanent establishment even though it exists, in practice, only for a very short period of time because the nature of the business is such that it will only be carried on for that short period of time. . . ."

In addition, the revenue has placed reliance on the following extract from Klaus Vogel's commentary on 'Double Taxation Convention' :—

"The term 'fixed' implies that a certain length of time is required for such business activities. The place of business must have been designed to serve the enterprise with a certain degree of permanence rather than merely temporarily. Whether the place of business meets this test of permanence must be judged against the background of all the circumstances constituting each individual case (which in Canadian practice may include even

considerations of the climate and weather, see Skaar, A, supra m. No. 1, at 220, 226). If the enterprise carries on its operations on a regular basis in its place of business, a permanent establishment must be taken to exist, irrespective of the minimum period rule laid down in Article 5(3). The latter twelve-month test applies only to building sites of construction or assembly projects (likewise Skaar, A., supra m. No. 1, at 216) and must not be interpreted to imply that a place of business should generally be deemed to be a 'permanent' one only if it had existed for a minimum of twelve months. . . ."

12. Concluding the arguments in respect of existence of PE, the revenue emphasized that the factual as well as legal matrix strongly lead to the inescapable inference that there does exist a PE in the instant case in terms of the paragraph 1 of Article 5 of Treaty and as such, the receipts by the applicant, as detailed in para 5 above, are taxable as business income under Article 7 read with Article 5(1) of the Treaty.

13. Apart from the submission already made on the existence of a PE under the Article 5(1) of the Treaty, the revenue has, in the written submission dated 2-9-2008, stated that ParGolf, with whom GID had entered into an agreement, has provided the services for organizing the events and as such ParGolf can be regarded as an agent of the applicant. Accordingly, there does exist an Agency PE in terms of paragraphs 4 and 5 of Article 5 of the Treaty. Further, taking into account the initial visit of Mr. Mohammed Juma BuAmin, Vice-Chairman of the Company on 27-5-2007, the total stay of the applicant through its employees aggregates to nine months or more and thus gives way to the existence of a Service PE as per the Article 5(2)(i) of the Treaty, argues the revenue.

Counter-argument of the applicant.

14. Responding on behalf of the applicant, Mr. Ranina argued that the stand of the revenue relating to the existence of PE is not legally tenable in terms of the Article 5 of the Treaty. According to the learned counsel, paragraph 1 of Article 5 of the Treaty defines the term "'Permanent Establishment' as a fixed place of business, through which the business of an enterprise is wholly or partly carried on". As stated in the OECD Commentary, the definition presupposes - (a) place of business, i.e., facility such as premises or in certain instances machinery and equipment (b) the place of business must be fixed, i.e., it must be established at a distinct place with a certain degree of permanence (c) the business of the enterprise must be carried on through this fixed place of business. Explaining further, the learned counsel submitted that the Golf Courses may undeniably be construed as places where the Golf tournaments are organized by the applicant in India during the duration of 6-7 days of the events held there. However, as per the learned counsel, merely having an access to the place (Golf course) is not sufficient in the sense that the 'place' must be 'fixed' and should also be at the 'disposal of the enterprise/person'. The learned counsel emphasized the fact that in the instant case, the place is neither 'fixed' nor is at the complete disposal of the applicant and as such the existence of a PE is simply unimaginable.

15 To strengthen his submissions, Mr. Ranina placed reliance on the following extracts from the commentary by Prof. Arvid Skaar (paras 131, 132 & 133 of the book) :—

"Musical tours etc.

The second main group consists of musical tours within the US. Some of these cases comply with the 'permanence test'. But the problem is whether a PE can be established when the performances take place at different locations. For instance, in Concert Tour, a case concerning a German

musical group, the group had concluded a contract with a US manager for a period of 14 months. However, the performances were held at different places, and also included performances in Canada. No PE was found, clearly because the performances were not located at one particular place. A similar question has been considered for circuses, ice shows and performances are given at a number of different places. Since the entertainer's performances are given at a number of different places, he does not have the centre of his activity located at a specific place. The actual duration of the stay in the US is thus immaterial."

16. Reliance has also been placed by the learned counsel on a decision of the New Zealand Court as culled out from Prof. Skaar's Book, wherein an Australian theatre company earning business income from theatrical performances at various locations in New Zealand was denied a PE due to transient nature of places of business. To support his contentions on this issue, the learned counsel relied on a string of examples such as those of ice skating shows, travelling circuses doing business on an itinerant basis as given at page 288, para 28 in Klaus Vogel's book. Further, Mr. Ranina also referred to a decision of Andhra Pradesh High Court in the case of CIT v. Visakhapatnam Port Trust [1983] 144 ITR 146 wherein also it was held that the words "Permanent Establishment" postulated the existence of a substantial element of 'an enduring or permanent nature'.

17. In the backdrop of the above examples and commentaries, the learned counsel argued that even in the case of the applicant there is no degree of permanence in respect of any of venues for the Golf tournaments because in terms of the contractual agreements there is no binding obligation for organizing these events in 2009 and 2010 at these very places. As such, the element of enduring permanence is missing in the instant case. Besides, the Golf Courses are also not at the exclusive disposal of GID. According to

the learned counsel, the non-exclusive and limited access to the space does not constitute a PE.

18. Stoutly denying the existence of a service PE, the learned counsel referred to the Article 5(2)(i) of the Treaty which specifically lays down that a service PE includes the "furnishing of services through employees or other personnel in the Contracting State (India), provided that such activities continue for the same project for a period aggregating more than 9 months within any twelve month period". It has been stated that the employees in the instant case did not furnish services on the project (i.e., of organizing Golf tournaments) for a period of more than nine months within a twelve month period. The learned counsel has also placed reliance on the principles of interpretation of the statutes, i.e., where there is a specific provision, it must override a general provision. Based on this, it has been argued that the present case has to be analysed under the specific provision of Article 5(2)(i) of the Treaty and if the case of the applicant does not fall under Article 5(2)(i), the general definition of PE as set out in Article 5(1) of the Treaty should not be pressed into service. Moreover, Mr. Ranina submitted that the services provided by various contractors and consultants (including ParGolf) cannot be viewed from 'PE perspective' as they were independent third party contractors and, not 'dependent personnel' of the enterprise.

Discussion reg. PE

19. We have given careful thought to the rival submissions made. The germane issue that survives here is - whether the applicant has a permanent establishment in India within the confines of Article 5 of the Treaty. The revenue has endeavoured to establish that there is primarily a locational PE (fixed place of business) in terms of the Article 5(1) of the Treaty and there is a Service PE and an Agency PE also in terms of Article

5(2)(i) and Article 5(4) read with Article 5(5) of the Treaty. However, much emphasis has been made in respect of the main definition as given in the Article 5(1) of the Treaty. All these contentions by the revenue have been rebutted by the learned counsel of the applicant, as summed up above.

20. To appreciate the point at issue, it will be quite apposite to reproduce Article 5 of the Treaty which is in the following terms (see 1994, 205 ITR St.52) :—

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

(2) The term 'permanent establishment' includes especially :—

(a) a place of management;
(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop;
(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(g) a farm or plantation;
(h) a building site or construction or assembly project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than 9 months;
(i) the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period.

(3) Notwithstanding the preceding provisions of this article, the term 'permanent establishment' shall be deemed not to include :—

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.

(4) Notwithstanding the provisions of paragraphs (1) and (3), where a person— other than an agent of independent status to whom paragraph (5) applies—acting on behalf of an enterprise and has, and habitually exercises in a Contracting State an authority to conclude contracts on behalf of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to the purchase of goods or merchandise for the enterprise.

(5) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of independent status within the meaning of this paragraph."

21. A combined reading of paras 1 to 5 of the Article 5 of the Treaty brings out the import of the expression "permanent establishment". Whereas para 1 defines the expression to mean a fixed place of business through which a business of an enterprise is wholly or partly carried on, para 2 enumerates nine places specified in clauses (a) to (i) to include them within the scope of the expression and para 3 contains a deemed exclusionary clause to exclude the use of facilities noted in clauses (a) to (e). However, para 4 contains a deemed inclusionary clause and lays down that notwithstanding the provisions of paras 1 and 2, a person acting on behalf of an enterprise in a Contracting State shall be deemed to have PE if it has an authority or habitually exercises an authority in the Contracting State to conclude contracts on behalf of the foreign enterprise. Para 5 incorporates a deemed exclusionary clause and states that an enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in the other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in ordinary course of their business. Unless the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he shall not be considered as an agent of independent status within the meaning of this paragraph. In other words, to apply second part of para 5, it has to be shown that (i) the applicant is claiming to carry on business through an agent of an independent status; (ii) the activities of such agents are carried out wholly or almost wholly on behalf of the applicant.

22. Taking up, first, the arguments put forward by both the parties in respect of existence of a Service PE, we are of the view that Article 5(2)(i) of the Treaty is not at all applicable in the present case. In fact, clause (i) of Article 5(2), as reproduced above in para 20, states that PE includes 'furnishing of services' by a foreign enterprise. In its ordinary connotation,

the concept of 'furnishing of services' is a bilateral concept and it necessarily postulates the existence of at least two parties, i.e., (a) a provider of Services and (b) a recipient of Services. The applicant is a mere organizer of an event which has resulted in some income. Assuming for a while that the applicant is a service provider in this case, the natural query is 'who is the recipient of the services'? In fact, there is no recipient of services here. Thus, the reliance placed on Article 5(2)(i) is misplaced. Even other -wise also, after taking into account the date of the visit of the Vice-Chairman of the applicant company on 27-5-2007, the period of physical presence of the applicant's employees or other personnel (dependent on the applicant) did not exceed more than 9 months in 12 months period, as required under the Article 5(2)(i) of the Treaty. Thus, the contentions of the revenue on this score are not at all tenable and there does not exist a Service PE in terms of the Article 5(2)(i) of the Treaty.

23. As regards the plea of an Agency PE, it nobody's case that independent contractors or third party vendors have and habitually exercised an authority to conclude contracts on behalf of the applicant in India. As such, paragraph 4 of the Article 5 of the Treaty does not govern the facts of this case. Further, it also admits of no doubt that independent third party local contractors/vendors were acting in ordinary course of their business and were not devoted wholly or almost wholly on behalf of the applicant. The facts in this case do not justify the conclusion that these third party contractors are agents of the applicant. ParGolf is carrying on its own business and is an independent entity. The activities of these third party contractors, inclusive of ParGolf, are not at all carried out wholly or almost wholly on behalf of the applicant. As such, there does not exist Agency PE in this case.

PE - Fixed place of business

24. What stands out from the arguments is that the revenue has placed much emphasis on the concept of PE as per the Article 5(1) of the Treaty which states that the term 'Permanent Establishment means a fixed place of business through which the business of an enterprise is wholly or partly carried on'. When paraphrased, the general definition of the term PE, as set out in the Article 5(1) of the Treaty, presupposes the following essential ingredients :—

(i) existence of an enterprise (foreign entity)
(ii) its carrying on a business
(iii) existence of a place of business
(iv) that which is fixed
(v) through which the business is carried on.

To appreciate the concept of PE on this score objectively, it will be appropriate to elaborate some of the essential ingredients as enumerated above.

Place of business/carrying on a business

The phraseology 'place of business' is indicative of geographical situs where the non-resident performs important functions of its business. On the basis of various examples given in the commentaries, the term 'place of business' primarily indicates the following :—

It covers any premises, facilities or installations used for carrying on the business of the non-resident, whether or not they are used exclusively for that purpose.

A place of business may exist where there is a certain amount of space which is used by the non-resident for business activities.

A place of business may be situated in the business facilities of another enterprise.

No formal legal right to use a particular place is required.

The mere presence of a non-resident at a particular location does not necessarily make that location a 'place of business'. In other words, it means that there should be relationship between the place and the business of the enterprise. That is, does the place of business support the business activity or does the business activity simply occur at the place of business? The following extract from the OECD Commentary (para 4 on page 86, 2006 Edition) supports the above analysis :—

Paras 4, 4.1 and 4.2:—

"(4) 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 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 area in a customs depot, i.e., for the storage of the dutiable goods. Again the place of business may be situated in the business facility 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.

(4.1) 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.

(4.2) 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 principles 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."

Meaning of Fixed place :

In its ordinary and plain meaning, the word 'fixed', as per the 'New Oxford Short Dictionary', means - (a) definitely and permanently placed or assigned (b) stationary or unchanging in relative position and (c) definite, permanent & lasting. Even according to the OECD commentary, the term 'fixed' means established at a distinct place with certain degree of permanence. As to what constitutes a reasonable period of time to give necessary degree of permanence depends upon the nature of business of the enterprise in the backdrop of facts of each case. Obviously, 'permanent' in the context of 'fixed place of business' does not mean for ever nor can it be merely transient. The observation of Sheppard J. in Applegate v. FCT [1978] 8 ATR 372, 378 may usefully be quoted here :—

"Permanent is used in the sense of something which is to be contrasted with that which is temporary or transitory. It does not mean ever lasting. The question is thus one of fact and degree."

In addition, it may quite befitting to recall the following observation of Justice Jagannath Rao from the Judgment in the case of Visakhapatnam Port Trust (supra) :—

"In our opinion, the words 'permanent establishment' postulate the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another country which can be attributed to a fixed place of business in that country. . . ." (p. 162)

Further, the following extract from the OECD Commentary is also quite eloquent :—

"Since the place of business must be fixed, it also follows that a permanent establishment can be deemed to exist only if the place of business has a certain degree of permanence, i.e., if it is not of a purely temporary nature. A place of business may, however, constitute permanent establishment even though it exist, in practice, only for a very short period of time because the nature of the business is such that it will be carried on for that short period of time. . . ."

Through which the business is carried on

The basic definition of PE as set out in the Article 5(1) of the Treaty ends up with the phraseology 'through which the business of an enterprise is carried on'. The ending words 'carried on' is tellingly eloquent and is indicative of continuum, frequency or regularity. According to the Stroud's Judicial Dictionary, the phrase 'carried on' - "implies a repetition or series of acts." The expression 'carry on business', in its ordinary meaning, signifies a succession of acts, and not simply the effecting of one solitary transaction. In Smith v. Anderson, 15.CH.D 247, 277-278, the observation of Brett. LJ. is as under :—

"The expression 'carrying on' implies a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated."

Further, in Kirkwood v. Gadd [1910] AC 422, at page 423, Lord Loveburn also said : "what is carrying on business? It imports a series of repetition of acts". The phrase used in the Article is 'carried on' as against other possible phrases 'carried out' or 'carried'. The use of preposition 'on' in conjunction with 'carried' suggests that the business should not be a one-off activity but a regular continued exercise even if it be intermittent and of short duration every time. In other words, the expression 'carry on business', in its ordinary meaning, signifies a course of conduct involving the performance of a succession of acts, and not the effecting of one solitary event. The phrase means more or less continuous venture which, if not taking place incessantly, should, at least, be regular in its occurrence. As such, ventures like travel circuses, musical troupe, stalls in exhibition and game shows etc., will have a fixed place PE in a State only if they carry on their activities on a regular basis.

25. In the backdrop of the above discussion, we have to consider the crucial question whether the opening part of the definition of PE is attracted. There are certain factors which have bearing on the first ingredient. During the days when the golf tournament is conducted, the Golf Course can be regarded as a place of business like a pitch in the market place because the centre of income earning activities was at that particular place which the applicant was authorized to use. During that period, Golf Course was at the disposal of the applicant for the stipulated time frame, though the owner can exercise some limited rights. In the context, the examples cited by Mr. Ranina of concert tours and ice-shows where the existence of permanent establishment was negatived are not very appropriate because such performances were dispersed and not held at identified places whereas in

the present case the event was undeniably at a particular spot, i.e., Golf Course. As regards the duration, it can be said that having regard to the special nature of business activity, the duration of business operations or the stay of the applicant's personnel in India need not be for long. Even if the business was done for short duration with intermittent gaps, the existence of fixed place of business at the particular spot, i.e., Golf Course may not be ruled out. No hard and fast rule can be laid down as to the number of days which can impart a degree of permanence to the place of business to make it a 'fixed' place. Irrespective of the fact whether the test of degree of permanence is satisfied in the instant case, taking an overall view, we are unable to hold that by organizing and conducting golf tournament at the Delhi or Bangalore Golf Course for a week's duration without repetition thereof the applicant has carried on business through a fixed place in India. On the basis of a solitary or isolated activity during the year, it is difficult to infer the existence of PE within the meaning of Article 5.1 of the Treaty. What is conspicuously missing is the ingredient of regularity, continuity and repetitiveness as conveyed by the word 'carried on'. In the agreement with DGC, there is no firm stipulation that these events will be repeated in future also at regular intervals at the same venue. Mere intention to hold them in 2009 and 2010 and that too at a date to be mutually agreed upon will not impart an aura of regularity or continuity. The holding of the tournaments in future still remains in the melting pot. In other words, the place of business does not, in the absence of firm stipulation in the contract, support any business activity. On the other hand, the business activity simply occurred at the place of business, i.e., DGC and Eagleton for one time only. The example of a salesman erecting a sales-stand regularly every week in three markets in Netherlands, cited by learned Departmental Representative, is not apt because in the case of salesman, the weekly visit is indicative of regularity, whereas in the present case the element of regularity is absent.

26. On the touchstone of whether the business of the applicant is being 'carried on' in India, as elucidated above; the answer relating to the existence of a PE is in the negative. It may not be out of place to observe that the course of events in future will determine whether a different view needs to be taken as regards the existence of PE within the meaning of Article 5(1) of the Treaty. We have reached the above conclusion in the context of factual position obtaining as on today and on the basis of the existing agreement with the DGC.

27. Accordingly, in the absence of a Permanent Establishment, as discussed in the preceding paras, the applicant's business income, as stated in para 5 above, cannot be taxed in India.

28. Further, at best, these receipts, i.e., management fees could have been brought to tax within the purview of Fees for Technical Services. However, in the absence of any provision in the Treaty with regard to FTS, the same cannot be taxed as FTS. Article 22 of the Treaty also does not come to the aid of the revenue, as it is in respect of 'other income'. In the initial arguments, the revenue had also contended that the receipts can be characterized as Royalty income. However, as per letter dated 10-9-2008, the revenue has conceded this point.

29. In the light of the above, we rule as under :—

Que. No. 1 That on the facts and circumstances of the case the applicant does not have a PE in India in terms of Article 5 of the Treaty.

Que. No. 2 In view of ruling on Que. No. 1 above, this question requires no ruling.

Que. No. 3 In view of ruling on Que. No. 1 above, the receipts earned by the applicant in India are not liable to tax in terms of Article 7 of the Treaty.

Que. No. 4 That on the facts and circumstances of the case the income of the applicant is not taxable under any other provision of the Treaty.

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*In favour of assessee.