IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.12.2023

\+ **ITA 216/2020 & CM Nos. 32641/2020, 32643/2020 & 56179/2022**

HYATT INTERNATIONAL-SOUTHWEST ASIA LTD. …. Appellant

v.

ADDITIONAL DIRECTOR OF INCOME TAX …. Respondent

AND

\+ **ITA 217/2020 & CM Nos. 32644/2020 & 32646/2020**

HYATT INTERNATIONAL-SOUTHWEST ASIA LTD. …. Appellant

v.

DEPUTY COMMISSIONER OF INCOME TAX …. Respondent

AND

\+ **ITA 218/2020 & CM Nos. 32647/2020 & 32649/2020**

HYATT INTERNATIONAL-SOUTHWEST ASIA LTD. …. Appellant

v.

ASSISTANT DIRECTOR OF INCOME TAX …. Respondent

AND

\+ **ITA 219/2020 & CM Nos. 32650/2020 & 32652/2020**

HYATT INTERNATIONAL-SOUTHWEST

ASIA LTD. …. Appellant

v.

ADDITIONAL DIRECTOR OF INCOME TAX …. Respondent

AND

\+ **ITA 140/2021 & CM Nos. 30258/2021, 30259/2021 & 30260/2021**

HYATT INTERNATIONAL-SOUTHWEST ASIA LTD. …. Appellant

v.

DEPUTY COMMISSIONER OF INCOME TAX …. Respondent

AND

\+ **ITA 36/2022 & CM APPL. 11636/2022**

HYATT INTERNATIONAL-SOUTHWEST ASIA LTD. …. Appellant

v.

ASSISTANT COMMISSIONER OF INCOME TAX …. Respondent

AND

\+ **ITA 201/2023 & CM APPL. 16442/2023**

HYATT INTERNATIONAL-SOUTHWEST ASIA LTD. …. Appellant

v.

ACIT (INTERNATIONAL TAXATION)- 2 (1) (1) NEW DELHI …. Respondent

AND

\+ **ITA 215/2023 & CM APPL. 18200/2023**

HYATT INTERNATIONAL-SOUTHWEST ASIA LTD. …. Appellant

v.

ACIT (INTERNATIONAL TAXATION)- 2 (1) (1) NEW DELHI …. Respondent

Advocates who appeared in this case:

For the Appellant : Mr S. Ganesh, Senior Advocate with Mr U.A. Rana and Mr Himanshu Mehta, Advocates.

For the Respondent : Mr Sanjay Kumar, Senior Standing Counsel for Revenue with Ms Easha Kadian, Advocate.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J.

INTRODUCTION

1. Hyatt International Southwest Asia Ltd. (hereafter '**the Assessee**') is a company incorporated under the Companies Law, Dubai International Financial Centre (DIFC) Law No. 3 of 2006 in the United Arab Emirates (hereafter '**UAE**'). It is a tax resident of the UAE under

Article 4 of the Agreement between Government of India and the UAE for Avoidance of Double Taxation (hereafter '**the DTAA**').

2. The Assessee has filed the present appeals under Section 260A of the Income Tax Act, 1961 (hereafter '**the Act**') impugning the orders passed by the Income Tax Appellate Tribunal (hereafter '**the Tribunal**') in the respective appeals preferred by the Assessee against the orders passed by the Assessing Officer (hereafter '**the AO**') under Section 143(3) of the Act read with Section 144C of the Act in respect of the Assessment Years 2009-2010 to 2017-2018.

3. The appeals against the order dated 21.11.2012 passed by the AO in respect of the Assessment Year 2009-10; order dated 28.11.2013 in respect of Assessment Year 2010-11; order dated 28.01.2015 in respect of Assessment Year 2011-12; and order dated 18.12.2015 in respect of Assessment Year 2012-13, were subject matter of appeals in ITA 579/Del/2013, ITA 779/Del/2014, ITA 1762/Del/2015 and ITA 957/Del/2016. These appeals were disposed of by the Tribunal by a common order dated 04.12.2019. The Assessee has filed appeals ITA No. 216/2020, ITA No. 217/2020, ITA No. 218/2020 and ITA No. 219/2020 impugning the said common order.

4. The Assessee has filed ITA 140/2021 impugning an order dated 12.03.2021 passed by the learned Tribunal in ITA No. 727/Del/2017. The said appeal was in turn preferred by the Assessee against the order dated 24.11.2016 passed by the AO under Sections 143(3) and 144C of the Act in respect of the Assessment year 2013-2014. The Tribunal

disposed of the Assessee's appeal by following the common order dated 04.12.2019 passed in the appeals relating to Assessment Years 2009-2010 to 2012-13, which are subject matter of the above-captioned appeals (ITA 216/2020 to 219/2020).

5. The Assessee has filed ITA 36/2022 impugning an order dated 27.07.2021 passed by the learned Tribunal in ITA No. 6179/Del/2017 in respect of Assessment Year 2014-15. In terms of the said order, the Tribunal had rejected the assessee's appeal following its order in ITA 727/Del/2017, which in turn had followed the common order dated 04.12.2019 passed by the Tribunal in appeals in respect of the Assessment Years 2009-10 to 2012-13.

6. In ITA 201/2023 and ITA 215/2023, the assessee appeals the common order dated 20.12.2022 passed by the Tribunal in ITA No. 6363/Del/2019 and ITA No. 712/Del/2021 in respect of the Assessment Years 2016-17 and 2017-18 respectively. The order dated 20.12.2022 also rejects the assessee's appeal by following the earlier order dated 04.12.2019.

7. These appeals involve common questions of law and, essentially, assail the aforementioned common order dated 04.12.2019 (hereafter also referred to as '**the impugned order**') passed by the learned Tribunal, which also is the foundation of the orders passed by the Tribunal that are the subject matter of ITA 36/2022, ITA 140/2021, ITA 201/2023 and ITA 215/2023.

QUESTIONS OF LAW

8. This Court by a common order dated 14.03.2023 in ITA 216/2019, ITA 217/2020, ITA 218/2020, ITA 219/2020, ITA 140/2021 and ITA 36/2022, had re-stated the questions that arise for consideration in these appeals as under:

> "(i) Whether the Tribunal misdirected itself both in law and on facts in holding that service charges received by the Appellant under the various SOSA Agreements were taxable as royalty?
>
> (ii) Whether the Appellant has Permanent Establishment in India within the meaning of the Double Taxation Avoidance Agreement?
>
> (iii) Whether the findings recorded by the Tribunal, in paragraphs 56, 57 and 59 are perverse and contrary to the terms of the Strategic Oversight Services Agreement (SOSA)?
>
> (iv) Is Article 7(1) of the DTAA at all applicable to the Appellant, having regard to the fact that it has incurred losses in the relevant financial years?"

FACTUAL CONTEXT

9. This Court shall consider the facts relating to the assessment for the Assessment Year 2009-10 which is the subject matter of ITA No.216/2020 for the purpose of addressing the aforesaid questions.

10. The aforesaid questions arise in the context of the following facts. On 04.09.2008, the Assessee entered into two Strategic Oversight Services Agreements (hereafter '**the SOSA**') with Asian Hotels

Limited, India. One in respect of a hotel (Hyatt Regency, Delhi – hereafter '**the Hotel'**) owned by Asian Hotels Limited, in Delhi, and the other in respect of a hotel located at Mumbai. Both the SOSAs' are similarly worded.

11. For the purpose of the present appeals, this Court would refer to the SOSA entered into in respect of the Hotel (the hotel located at Delhi - Hyatt Regency). In terms of the SOSA, the Assessee agreed to provide strategic planning services and "Know-How" to ensure that the Hotel is developed and operated as an efficient and a high quality international full-service hotel.

12. Asian Hotels Limited was thereafter reorganized and its name was subsequently changed to Asian Hotels (North) Limited (hereafter '**the Owner'**). The said company continued to own the Hotel. On 18.07.2010, the SOSA was partially amended.

13. The Assessee filed a return of income for the Assessment Year 2009-10 (previous year 2008-09) declaring 'Nil' income and claiming refund of ₹87,99,091/-. The said return was picked up for scrutiny and the AO issued a notice dated 20.08.2010 under Section 142(1) read with Section 143(3) of the Act along with a questionnaire, to the Assessee. The Assessee responded to the said notice by a letter dated 25.08.2011 and furnished a brief note.

14. According to the Assessee, its income was not taxable under the Act as there was no specific Article under the DTAA for Taxing Fees

for Technical Services. The Assessee further claimed that it had no fixed place of business, office or branch in India. Further the presence of the Assessee's employees in India during the relevant previous year did not exceed the specified time of nine months under Article 5(2) of the DTAA and therefore, the Assessee did not have the 'Permanent Establishment' (hereafter **'PE'**) in India as contemplated under Article 5 of the DTAA. The Assessee claimed that its business income was not taxable under Article 7 of the DTAA as well.

15. During the course of the assessment proceedings, the Assessee was called upon to provide certain details and information. In response to the said notice, the Assessee furnished a note explaining why its receipts are not taxable as Fees for Technical Services (FTS). The Assessee also furnished a summary on the nature of the services provided by it to the Owner during the relevant Assessment Year. The Assessee also provided details of the visits of its employees to India in connection with SOSA during the relevant Previous Year. In all, the Assessee's six employees had stayed in India during the relevant period for an aggregate period of 158 days (one hundred and fifty-eight days). The Assessee also provided the job description of its employees who had visited India during the relevant period.

ASSESSMENT ORDER

16. The AO furnished a draft assessment order dated 28.12.2011 holding that the Assessee was "*actually operating the hotels belonging to the owners in each and every manner*". The AO held that there was

continuous presence of the Assessee through its employees or other personnel throughout the year. The AO concluded that apart from operating the Hotel, the Assessee also provided its proprietary, written knowledge, skill, experience, operational and management information and associated technologies etc. and therefore, its receipts constituted 'royalties' as defined in Section 9(1)(vi) of the Act and Article 12 of the DTAA.

17. The AO held that the Assessee's activities constituted (i) business connection under Section 9(1)(i) of the Act; (ii) PE under Article 5 of the DTAA; (iii) royalties and FTS under Section 9(1)(vi)/(vii) of the Act; and, (iv) royalties under Article 12 of the DTAA. The AO did not accept that the Assessee did not have a PE in India. According to the AO, the Assessee had a fixed place of business at its disposal throughout the year in the premises of the Hotel, including the Chambers of the Managing Director and other expatriates who were continually present. The AO held that although the Assessee had restricted the stay of its employees in India below the specified period but, it was clear that the premises were available to the Assessee for the entire duration. And, that it had carried out its activities for performing its obligations under the SOSA from the said premises. The AO also held that the Assessee was providing Central Reservation System (**CRS**) services, which also constituted fixed place of business. In addition, the AO held that the Assessee had a PE in terms of Article 5(2) of the DTAA. The AO observed that the employees of the Assessee were physically present in each month of the Previous Year and that it was of no relevance that the

employees came and left during the said period. The activities undertaken by them pursuant to the SOSA continued throughout the year. The AO held that a part of the activities also qualified as the fees to be treated as royalties.

18. The AO computed the tax payable by the Assessee at 10% of the gross receipts. It held that the royalties and FTS relatable to the PE were required to be taxed on net basis in accordance with Article 7 of the DTAA and Section 44 DA of the Act. However, since no information was provided by the Assessee in regard to the computation of taxable profits attributable to its PE in India, the AO assumed that the Assessee's net profit would be 25% of the receipts and resultantly, the tax would be payable at 10% of the gross receipts.

ASSESSEE'S OBJECTIONS

19. On 22.01.2012, the Assessee filed its objections to the draft assessment order issued under Section 143(3) of the Act read with Section 144C of the Act with the Dispute Resolution Panel (hereafter '**the DRP**'). The Assessee's objections were founded on four grounds.

19.1 First, that the AO had erred in facts and in law in holding that the Assessee had a PE in India under Article 5(1) and Article 5(2) of the DTAA.

19.2 Second, that the AO had disregarded the audited financial statement (on global basis), which disclosed that the Assessee had declared losses. And, the AO had arbitrarily adopted 25% of the gross

receipts as taxable income attributable to the Assessees's alleged PE in India.

19.3 Third, that the payment of ₹8,51,41,569/- received from the Owner under the SOSA was primarily for consultancy services and the AO had erred in treating the same as 'royalty' under the DTAA on an erroneous assumption that it relates to the provisions of Know-how, skill, experience, commercial information and other intangibles.

19.4 Fourth, that the AO had erred in not granting an opportunity to the Assessee to clarify as to why the fees for consultancy services did not constitute payment for intangibles to be categorized as royalty.

20. The DRP rejected the aforesaid objections. Thereafter, on 21.11.2012, the AO passed the Final Assessment Order.

TRIBUNAL'S ORDER

21. The Assessee appealed the Assessment Order dated 21.11.2012 before the Tribunal. The Tribunal examined the terms of the SOSA and rejected the Assessee's contention that it did not have a PE in India.

22. The Tribunal held that the amounts received by the Assessee were royalties.

23. The Tribunal referred to the decision of the Supreme Court in the case of ***Formula One World Championship Limited. v. Commissioner of Income Tax, International Taxation-3, Delhi & Anr***[1] and held that

[1] (2017) 15 SCC 602

the Assessee had a fixed place of business in India and therefore, is a PE in terms of Article 5(1) of the DTAA.

24. The operative parts of the impugned order dated 04.12.2019 passed by the Tribunal are set out below:

> "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 owning 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 Linese Rotables Vs. DIT 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 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 DAA. Thus, we hold that based on the DAA 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 the 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 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."

SUBMISSIONS

25. At the outset, Mr. S. Ganesh, learned senior counsel appearing for the Assessee submitted that the conclusions of the AO and the Tribunal were premised on the reading of the SOSA and therefore, the questions whether the payments received by the Assessee were taxable as royalty and whether the Assessee had a PE in India, were required to be determined on a careful reading of the SOSA and the terms of the DTAA.

26. He submitted that the Tribunal had grossly erred in proceeding on the basis that the Assessee had *"complete control and discretion with respect to all aspects or operations of the hotel"* and that *"was totally involved in the maintenance and operation of running hotels even allowing the owner a very minimal role"*. He contended that the said conclusion disregards and ignores a crucial fact that the Owner had simultaneously while entering into the SOSA with the Assessee also entered into a Hotel Operation Service Agreement (hereafter '**HOSA**') with Hyatt India Consultancy Pvt. Ltd. (hereafter '**Hyatt India**') whereby Hyatt India had agreed to provide day-to-day management assistance and render technical assistance for the operation of the Hotel. He submitted that the SOSA could not be read in isolation and was required to be read in conjunction with the HOSA. This would clearly establish that the Assessee was not in control of the day-to-day management, administration, finance and other aspects of the Hotel. He

submitted that the findings in paragraphs 57 and 58 of the impugned order were thus, perverse.

27. Next, he contended that the Tribunal's finding that the Assessee's receipts under the SOSA were royalty and taxable under Article 12 of the DTAA was rendered without any reasoning and discussion. He submitted that the Tribunal had made no attempts to indicate how the requirements of Article 12 of the DTAA were satisfied in the present case. He contended that the Tribunal's finding that the Assessee's receipts were taxable under Article 12 of the DTAA were also inconsistent with the finding regarding Article 5(1) of the DTAA. He contended that the findings that the Assessee had a PE under Article 5(1) of the DTAA "*was superseded, swept away and nullified*" by the Tribunal's findings in regard to the Assessee's revenue being taxable under Article 12 of the DTAA.

28. He submitted that in terms of the SOSA, the Assessee had permitted the Owner to use its knowledge and information for the purpose of operation of the Hotel. Therefore, the permitted use of knowledge and information were strictly incidental and ancillary to rendering services by the Assessee. He submitted that it is settled position that payments for service, where the use of intellectual property is only incidental, cannot be considered as royalty.

29. He referred to the decision of the Supreme Court in ***Formula One World Championship Ltd.***[1] and the decision of the Coordinate Bench

of this Court in ***Director of Income Tax v. Sheraton International Inc.***[2] in support of the said contention.

30. Mr. Sanjay Kumar, learned counsel appearing for the Revenue countered the aforesaid submissions. He referred to Sections 1 and 2 of Article III of the SOSA and submitted that the said terms clearly substantiated that the Assessee was not only having a fixed place of business in the Hotel premises but was controlling its entire affairs. He contended that a reading of the SOSA made it clear that the Owners were only for namesake and that the entire control of the Hotel rested with the Assessee. He submitted that the Assessee's contention that it only issues guidelines, is misleading. He contended that the guidelines would remain guidelines only if the Owner had the discretion not to accept the same. He submitted that the terms of the SOSA clearly indicated that the Owner could not reject or defy any guidelines or directions issued by the Assessee in respect of running the Hotel. He submitted that the Assessee's contention that the management services were provided by a separate entity was not tenable. He pointed out that Section 5 of Article III of the SOSA stipulated that all debts and liabilities to third persons in the course of operation of the guidelines would be that of the Owner and the Assessee would not be liable for the same. He contended that this clearly indicated that the Assessee had complete control over the Owner in the business of the Hotel. Such terms had the potential to affect the profit making capability of the

[2] 2009 SCC OnLine Del 4231

Indian entity which in turn adversely affected the interest of the Revenue. Similarly, he referred to other clauses, which granted immunity to the Assessee in respect of any matter relating to the hotel or performance of the SOSA. He submitted that there is no dispute that the Assessee had sent employees to India and they were working from the Hotel premises, thus, the Assessee had a principal place of business in the Hotel premises at its disposal.

31. He also relied on the decision of the Supreme Court in ***Formula One World Championship Ltd.***[1] and submitted that the degree of control depended upon the type of activity that the taxpayer carried on. It is therefore not necessary that the Assessee is able to exclude others from entering the said place of business. He submitted that in the given facts, the finding that the Assessee had a fixed place of business in the Hotel premises could not be faulted.

32. Next, he submitted that the provisions of Article 12 of the DTAA is required to be read in conjunction with Article 7 of the DTAA. He submitted that the consideration received by the Assessee was clearly in the form of 'royalties' as defined under Article 12(3) of the DTAA. Since, the Assessee also had a PE in India, the application of Articles 12(1) and 12(2) of the DTAA would stand excluded and the provisions of Article 7 of the DTAA would apply in respect of such income by virtue of Article 12(4) of the DTAA. Accordingly, the Assessee's income was required to be computed under the provisions of Section 44A of the Act.

REASONS & CONCLUSION

Re: Question No. (iv)

33. One of the principal contentions advanced by the Assessee is that even if it is assumed that the Assessee has a PE in India, there is no question of attributing any amount as income chargeable to tax under the Act to its PE, as it has incurred a loss on an entity level (global basis). According to the Assessee, income chargeable to tax under the Act could be attributed to its PE in India only if the Assessee had made profit on an entity level. Concededly, the said issue is covered in favour of the Assessee by a decision of the Coordinate Bench of this Court in ***Commissioner of Income Tax (International Taxation)-2 v. M/s Nokia Solutions and Networks OY***[3] . However, we have some reservations regarding the said view.

34. The profits attributable to the Assessee's PE in India are required to be determined on the footing that the PE is an independent taxable entity. It is, thus, possible that an Assessee makes a net loss at an entity level on account of losses suffered in other jurisdictions, which is partly offset by profits arising from India. In these circumstances, if it is held that the Assessee has a PE in India, *prima facie* the Assessee would be liable to pay tax on the income attributable to its PE in India notwithstanding the losses suffered in other jurisdictions. This aspect

[3] (2023) 455 ITR 157

was not deliberated in the case of ***Commissioner of Income Tax (International Taxation)-2 v. Nokia Solutions and Networks OY.***[3]

35. This Court was of the view that the fourth question as raised by the Assessee ought to be referred to a larger Bench. This was recorded by this Court in an order dated 14.03.2023. However, the learned senior counsel appearing for the Assessee had requested this Court to consider the other questions and had asserted that the Assessee would not press the fourth question, if the Assessee's appeals are disposed of in its favour on the basis of the other questions as framed. The learned counsel for the parties had also agreed that if the appellant succeeded before this Court in respect of the first three questions, the Assessee would finally give-up the fourth question without any recourse.

36. In view of the above, this Court is confining further deliberations to the first three questions as set out above.

Indo-UAE DTAA

37. The principal questions to be addressed is whether the Assessee's revenue receipts in terms of the SOSA are taxable as royalty and whether the Assessee has a PE in India within the meaning of the DTAA.

38. Before proceeding further, it would be relevant to refer to the DTAA. Article 4 of the DTAA defines the term "resident of a Contracting State". In terms of Article 4(1)(b) of the DTAA, a company which is incorporated in UAE and is managed and controlled wholly in

UAE would be a resident of UAE. The Assessee had produced a Tax Residency Certificate and there is no dispute that the Assessee is a resident of UAE in terms of the DTAA.

39. Article 5 of the DTAA defines the expression 'Permanent Establishment'. Article 7 of the DTA contains provisions regarding taxability of business profits. Article 12 of the DTAA defines the term 'Royalties' and its taxability under the DTAA.

40. Paragraph (1) of Article 22 expressly provides that subject to the provisions of paragraph (2) of the DTAA, items of incomes of a resident of a Contracting State, whenever arising, which are not expressly dealt with the foregoing articles, that is, under Articles 1 to 22 of the DTAA, would be taxable only in the State where the taxpayer is resident.

41. Paragraphs (1) and (2) of Article 5, Article 7, Article 12 and Article 22 of the DTAA are relevant and are set out below:

> **"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.

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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, in accordance with the provisions of and subject to the limitations of the tax laws of that State.

4. Insofar as it has been customary in a Cont1·acting 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 principles 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.

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Article 12 – Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties the tax so charged shall not exceed 10 per cent of the gross amount of such royalties.

3. The term "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, trademark, 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 or quarries or exploitation of petroleum or other natural resources.

4. The provisions of paragraphs (1) and (2) shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, 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 royalties are 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.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the

royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

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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 income1 being a resident of a Contracting State, carries on business in the other 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."

42. Paragraph (2) of Article 12 of DTAA expressly provides that royalties may be taxed in the Contracting State in which they arise according to the laws of that State. However, the tax so charged shall not exceed 10% of the gross amount of royalties. Paragraph (4) of Article 12 of the DTAA, *inter alia,* provide that paragraph (2) of Article 12 of the DTAA is inapplicable to where the beneficial owner of the royalties, being a resident of a contracting state carries on business in the other Contracting State in which royalties arise through a permanent establishment and the right or property in respect of which the royalties arise is effectively connected with the permanent establishment. In such a case, provisions of Article 7 of the DTAA would apply. Thus, notwithstanding that the receipts are royalties, as defined in paragraph (3) of Article 12 of the DTAA, the same would be taxable as business profits. In such case the restriction that the amount of tax be limited to a maximum of 10% on the gross receipts as provided in paragraph (2) of Article 12 of the DTAA, would be inapplicable.

Re Question no. (i)

43. The first and foremost question to be addressed is whether the Assessee's income receipts from SOSA are liable to be taxed as royalties. The expression 'royalty' is defined in Sub-paragraph (3) of

Article 12 of the DTAA to, *inter alia*, mean *"payment of any kind received as consideration for the use of or the right to use... artistic or scientific work ..any patent, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use.. or for information concerning industrial, commercial or scientific experience."* Thus, the main question is whether the Assessee's receipts in terms of SOSA is consideration for the use of or the right to use any scientific work, patent, trademark, design or model, a plan, secret formula or process or for information concerning commercial or scientific experience.

44. There is no dispute that the aforesaid question is required to be ascertained on a plain reading of the terms of the SOSA.

45. The Recitals of the SOSA indicate that the Owner and Hyatt International Southwest Asia Limited (an affiliate of the Assessee) had entered into a Sales and Marketing and Management Service Agreement dated 18.12.1993 (termed as "**the Original Management Agreement**") for providing Sales, Marketing and Management Services. The Assessee and the Owner along with other affiliates had decided to enter into a set of agreements to replace the Original Management Agreement. The services that were provided under the Original Management Agreement were split up and were provided in terms of SOSA and other agreements entered into between the owner and the Assessee and the Owner and other affiliates of the Assessee, contemporaneously.

46. The Recitals of the SOSA indicate that the Owner had entered into a Technical Services Agreement dated 21.07.2008 in connection with provisions of certain technical services for expansion of the Hotel. At the time of entering into the SOSA, the Owner, apart from entering into SOSA, had simultaneously also entered into HOSA (Hotel Operation Service Agreement) with Hyatt India, whereby Hyatt India had agreed to provide day to day operations, management assistance and technical assistance services to oversee the implementation of the overall strategic planning and Know-How (as defined in SOSA) to be provided by the Assessee. In addition, the Owner and Hyatt International had also entered in certain trademark license agreements pursuant to which the owner was permitted to use Hyatt trademarks as specified in the Agreement in connection with the operation of the Hotel. These agreements, which are mentioned in the recitals of SOSA, are not on record. However, there is no cavil that the Owner had entered into separate agreements for availing technical services, and use of trademarks.

47. Article II of SOSA sets out that the agreement between the parties in regard to the operative term of SOSA – would be for a term of twenty years from the Effective date and could be extended for a period of ten years by mutual Agreement.

48. The SOSA would become operative subject to the approvals, if any, required by the Government. It is also provided that till the SOSA

became effective, the Original Management Agreement would continue to be operative.

49. Article III of the SOSA sets out the covenants in respect of the Operation of the Hotel. In terms of Section 1 of Article III, the parties agreed that the Hotel would be operated consistent with the standards comparable to those prevailing in International Hotels Operated by Hyatt International and its subsidiaries ("Hyatt Operating Standards"). The Assessee agreed to provide strategic plans, policies, process, guidelines and parameters for operating the Hotel in a manner consistent with the 'Hyatt Operating Standards'.

50. The Assessee also agreed to use its reasonable efforts to minimise conflict among Hyatt International Branded Hotels and the Hotel.

51. In terms of Section 2 of Article III of SOSA, the parties agreed that the Assessee would have complete control and discretion in formulating and establishing the general and strategic plan with regard to all aspects of the hotel including branding, marketing, product development and day to day onsite operations.

52. In terms of Section 3 of Article III of SOSA, the Assessee agreed to formulate and establish overall strategic plans, policies, process, guidelines and parameters in accordance with the Hyatt Operating Standards. It was further agreed that the provision of strategic plans, policies, processes, guidelines and parameters would include recruiting, interviewing and assistance in hiring the General Manager and other

Hotel employees to the extent of such recruitment, interviewing and hiring needed to be conducted outside India. The plans, policies and procedures would also include formulating and establishing overall human resource policies; establishing overall strategic purchasing policies with regard to selection of goods, supplies, materials including food, beverages, furnishings and equipment etc.; determining policies for the admittance of guests; use of Hotel for customary purposes; charges for Hotel services, promotion and marketing of the Hotel; sales and marketing services; and centralized reservations services. The Assessee would also make available personnel for the purposes of reviewing plans and specifications for future alterations of the premises and advising with reference to design of replacement furnishing and equipment. It would also assist in establishing other policies for operation of the Hotel in accordance with Hyatt Operating Standards. Section (1), Section (2) and Section (3) of Article III of SOSA are set out below:

> "**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 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 on 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."

53. In addition to the above, in terms of Section 4 of Article III of SOSA, the Assessee also agreed to establish policies with regard to handling of Operating Bank Account(s) for operating the Hotel.

54. It is apparent from the above that the Assessee was required to render services in the area of strategic planning, maintaining the Hyatt Operating Standards and covering all aspects of the operation of the Hotel.

55. Section 6 of Article III of SOSA provided for Assessee's entitlement for reimbursement of certain expenses. It was agreed that the Assessee would be reimbursed costs for certain services including internal audits, management operation reviews and specialised training program. It is implicit that the Assessee had also agreed to render the said services. The relevant extract of Section 6 of Article III of SOSA is set out below:

> "**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 VII), 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."

56. In terms of Section 7 of Article III, it was agreed that the Assessee would identify, recruit and assist in appointing any non-local employees of the Hotel including General Manager, key personnel and Executive Committee Members for and on behalf of the Owner. However, it was also specified that the same would be in consultation with the Owner and it would have the right to approve such appointments.

57. The Assessee was also required to formulate human resource policies consistent with the Hyatt Operating Standards. The Assessee could also assign its employees on a temporary basis to discharge the function of full time members of the executive staff of the Hotel as well. Section 7 of Article III of SOSA is set out below:

> "**Section 7. Employees of the Hotel.**
>
> Strategic Services Provider shall, on behalf of and in consultation with Owner, identify, 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."

58. It is apparent from the plain reading of Article III and other provisions of SOSA that the Assessee had an overarching role in the management of the Hotel albeit at the policy level, with further right to oversee its implementation to ensure that the Hotel is operated as an upscale Hotel commensurate with the standards of the Hyatt chain of hotels – Hyatt Operating Standards. It is also amply clear that the policies and procedures framed by the Assessee covered every aspect of the management of the Hotel.

59. It is material to note that the Assessee was not required to manage day-to-day operations of the Hotel. It is apparent that the day-to-day affairs of the Hotel were required to be managed by Hyatt India (an Indian Company affiliated to the Assessee) in terms of the HOSA. But Hyatt India was required to implement the strategic policies as set out by the Assessee.

60. The Assessee was also required to broadly oversee the implementation of its policies. The Assessee was called upon to provide the job description of various employees deputed during the Previous Year for rendering assistance for operation of the Hotel (as well as the hotel in Mumbai). A tabular statement indicating the name of the employee, designation and the job description as set out in the impugned order is reproduced below:

"Sr. No.	**Name of 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. • Guidelines 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 with 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."

61. A plain reading of the above also indicates the services performed by the employees who were deputed by the Assessee to visit India in discharge of its obligations under the SOSA.

62. Additionally, in terms of Section 3 of Article III of SOSA, the Assessee also agreed to provide the Owner and other employees of the Hotel, proprietary, written knowledge, skills, experience, operational and management information and associated technologies related to operation of international, luxury full service Hotels, which the Assessee and its affiliates had developed over a period of time. This was described under Section 3 of Article III of SOSA as "Know-How". However, the terms of SOSA also made it clear that the provisions of

the Know-How would be "*in furtherance of the oversight and strategic planning services to be provided for the benefit of the Hotel*".

63. In consideration of the host of services to be provided in terms of the SOSA, the Assessee would be entitled to fee (strategic fee as well as incentive fee) as set out in SOSA. It is clear that the said fee is not a consideration for use of or the right to use any process or for information of commercial or scientific experience. The fees payable is in consideration of providing the services as set out in SOSA and as highlighted above.

64. We are unable to accept the Revenue's contention that the fee received by the Assessee in terms of SOSA could be termed as consideration for use or for right to use any design, model, process and also for information concerning commercial and scientific experience. Indisputably, in terms of the SOSA, the Assessee had agreed to provide access. However, such access is only incidental to the services agreed to be provided by the Assessee. The obligation to grant access to information, knowledge and software is solely to certain information, written knowledge, skill and experience in furtherance of the service provided by the Assessee under SOSA and for operating the Hotel. Merely because the extensive services rendered by the Assessee in terms of the SOSA also included access to written knowledge, processes, and commercial information in furtherance of the services, cannot lead to the conclusion that the fee received by the Assessee was in the nature of royalty as defined under Article 12 of the DTAA.

65. In ***Director of Income Tax v. Sheraton International Inc.***[2], the Coordinate Bench of this Court had, *inter alia*, considered the question whether the fee received by Sheraton International Inc. (a company engaged in providing services to hotels in various part of the world) could be considered as royalty in terms of Double Taxation Avoidance Agreement between India and United States of America. The Commissioner of Income Tax (Appeals) in that case had held that the fee received by Sheraton International Inc. towards service for maintenance of high international standards as well as use of trademarks, trade name and stylized 'S', which were ostensibly provided free of charge, would constitute royalty under Section 9(1)(vi) of the Act and also under Article 12(3)(a) of the Indo-US DTAA. This Court did not accept the said view. The Court held that the services rendered by the Assessee in that case were in the field of hotel industries in relation to advertisement, publicity and sales promotion and not in the nature of technical and consultancy services, which involved making technology available. The access to computerized reservation system (CRS) was held to be an integral part of the business arrangement between the assessee in that case (Sheraton Hotel) and Indian hotels, which was not separable from the integrated services in respect of marketing, publicity and sales promotion. The relevant extract of the operative part of the said decision reads as under:

> "In view of the aforesaid findings of the Tribunal that the main service rendered by the assessee to its clients-hotels was advertisement, publicity and sales promotion keeping in mind their mutual interest and, in that context, the use of trade

> mark, trade name or the stylized "S" or other enumerated services referred to in the agreement with the assessee were incidental to the said main service, it rightly concluded, in our view, that the payments received were neither in the nature of royalty under section 9(1)(vi) read with *Explanation* 2 or in the nature of fee for technical services under section 9(1)(vii) read with *Explanation* 2 or taxable under article 12 of the DTAA. The payments received were thus, rightly held by the Tribunal, to be in the nature of business income."

66. In view of the above, the consideration received by the Assessee in terms of SOSA cannot be termed as Royalty under Article 12 of the DTAA. It is clearly in the nature of business income.

67. It is relevant to note that the Assessee had contended before the authorities that the amount received under SOSA was Fees for Technical Services (FTS). We are unable to accept the same. This is also inconsistent with the submissions advanced before this Court. The fee received is not fees for technical services but in consideration for wide range of services as discussed above. Since, the Assessee is in the business of providing such services for management of Hotels, the income is required to be classified as income from business.

68. The first question is, thus, answered in the affirmative in favour of the Assessee and against the Revenue.

Re Question (ii)

69. The next question to be examined is whether the Assessee has a permanent establishment in India within the meaning of the DTAA. The operative part of the impugned order (paragraph no.58) indicates that

the learned Tribunal had sustained the Revenue's case that the Assessee has a PE in India on the basis that it carried on its business through a fixed place of business – the Hotel. Accordingly, the Tribunal has held that the Assessee has a PE under Article 5(1) of the DTAA. Thus, the main issue to be determined is whether the Assessee has a fixed place of business in India which can be construed as its PE (Permanent Establishment) under Article 5(1) of the DTAA.

70. In terms of paragraph (1) of Article 5 of the DTAA, the term "Permanent Establishment" would mean a fixed place of business through which business of an enterprise is wholly or partly carried out.

71. In ***Formula One World Championship Ltd. v. Commissioner of Income Tax, International Taxation-3, Delhi &Anr.***[1], the Supreme Court had referred to the text of "A Manual on the OECD Model Tax Convention on Income and on Capital" by Philip Baker Q.C. and had noted that the author had classified 'PE' as contemplated under Article 5 of the Organization for Economic Cooperation and Development's (OECD) Model of Double Taxation Convention in two categories. First, category included an establishment, which is a part of the same enterprise under common ownership and control such as an office, branch etc. This category of PE is described as "associated permanent establishment". The other category is PE through agency. Although an agent is a separate entity, but where it is significantly dependent on the enterprise to the point of forming a PE and projecting the enterprise in

the State, the enterprise would have a PE. This category of PE is described as "unassociated permanent establishment".

72. The Supreme Court had noted that in the first type of PE – an associated permanent establishment – the primary requirement is that it must be a fixed place of business through which the business of an enterprise is wholly or partly is carried on. As is apparent, this is the requirement for construing a PE under paragraph (1) of Article 5 of the DTAA. The Supreme Court had explained that the same entails two requirements to be fulfilled. First, that there must be a business of an enterprise of a Contracting State; and second, that the PE must be a fixed place of business, which is at the disposal of an enterprise. Further, the Court had explained that for ascertaining whether there is a fixed place of business or not, PE must have three characteristics being stability, productivity and independence. The Court held that one of the principal tests to determine whether an enterprise has a PE or not is to determine whether the fixed place of business, stated to be the PE is *at the disposal* of the enterprise. The relevant extract of the said decision is set out below:

> "30. Emphasising that as a creature of international tax law, the concept of PE has a particularly strong claim to a uniform international meaning, Philip Baker discerns two types of PEs contemplated under Article 5 of OECD Model. First, an establishment which is part of the same enterprise under common ownership and control—an office, branch, etc., to which he gives his own description as an "associated permanent establishment". The second type is an agent, though legally separate from the enterprise, nevertheless who is dependent on the enterprise to the point of forming a PE.

> Such PE is given the nomenclature of "unassociated permanent establishment" by Baker. He, however, pointed out that there is a possibility of a third type of PE i.e. a construction or installation site may be regarded as PE under certain circumstances. In the first type of PE i.e. associated permanent establishments, primary requirement is that there must be a fixed place of business through which the business of an enterprise is wholly or partly carried on. It entails two requirements which need to be fulfilled: (*a*) there must be a business of an enterprise of a contracting State (FOWC in the instant case); and (*b*) PE must be a fixed place of business i.e. a place which is at the disposal of the enterprise. It is universally accepted that for ascertaining whether there is a fixed place or not, PE must have three characteristics: *stability*, *productivity* and *dependence*. Further, fixed place of business connotes existence of a physical location which is at the disposal of the enterprise through which the business is carried on.
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> 33. The principal test, in order to ascertain as to whether an establishment has a fixed place of business or not, is that such physically located premises have to be "at the disposal" of the enterprise. For this purpose, it is not necessary that the premises are owned or even rented by the enterprise. It will be sufficient if the premises are put at the disposal of the enterprise. However, merely giving access to such a place to the enterprise for the purposes of the project would not suffice. The place would be treated as "at the disposal" of the enterprise when the enterprise has right to use the said place and has control thereupon."

73. In a later decision in ***Assistant Director of Income Tax-I, New Delhi v. E. Funds IT Solutions Inc.***[4], the Supreme Court referred extensively to the earlier decision in ***Formula One World Championship Ltd. v. Commissioner of Income Tax, International***

[4] (2018) 13 SCC 294

Taxation-3, Delhi &Anr.[1] and held that the question as to "what is a place of business" is no longer *res integra*. An enterprise would have a PE if it carries on its business wholly or in part through a fixed place of business. For an enterprise to have a fixed place of business, it is necessary that the said premises be at the disposal of the enterprise. The Supreme Court had also explained that the place would be treated at the disposal of an enterprise only when the enterprise has a right to use the said place and exercises control over the said place of business.

74. According to the Revenue, the Hotel premises constituted a fixed place through which the Assessee carried on its business in part. According to the AO, the Assessee had access to the chambers of the General Manager of the Hotel and the same could be construed as Assessee's fixed place of business.

75. There is no cavil that the Hotel premises has all attributes of being a fixed place. The only issue is whether the Hotel was at the disposal of the Assessee through which it carried on its business.

76. In ***Formula One World Championship Ltd. v. Commissioner of Income Tax, International Taxation-3, Delhi & Anr.***[1], the Supreme Court referred to the text of "Klaus Vogel on Double Taxation Conventions" and accepted the proposition that a fixed place would be at the disposal of the enterprise if it controls the place of business to a considerable extent. It is not necessary that the enterprise has any legal right to exclude other persons from the said premises or holds any legal interest in the fixed place, for it to be construed as at *its disposal*. It is sufficient

that the enterprise exercises an effective degree of control over its business activity. The extent of control required for the fixed place of business to be construed as the PE depends on the business activity carried on by the taxpayer. It is recognized that whilst certain activities may require a lesser degree of control over the place of business and yet be construed at the disposal of the enterprise, certain other activities may require a higher degree of control.

77. It is well accepted that an enterprise would be recognized as controlling the fixed place of business if it can use it at its discretion. In ***Formula One World Championship Ltd. v. Commissioner of Income Tax, International Taxation-3, Delhi & Anr.***[1], the Supreme Court had referred to the OECD Manual Convention and had noted as under:

> "The OECD MC shows a paramount tendency (though no strict rule) that PEs should be treated like subsidiaries (cf. Article 24(3) OECD and UN MC), and that facilities of a subsidiary would rarely been unusable outside the office hours of one of its customers (i.e. a third person), the view of the two courts is still more convincing.
>
> Along these lines, a POB will usually exist only where the taxpayer is free to use the POB:
>
> – at any time of his own choice;
>
> – for work relating to more than one customer; and
>
> – for his internal administrative and bureaucratic work.
>
> In all, the taxpayer will usually be regarded as controlling the POB only where he can employ it at his discretion. This does

> not imply that the standards of the control test should not be flexible and adaptive. Generally, the less invasive the activities are, and the more they allow a parallel use of the same POB by other persons, the lower are the requirements under the control test. There are, however, a number of traditional PEs which by their nature require an exclusive use of the POB by only one taxpayer and/or his personnel. A small workshop (cf. Article 5(2)(e) OECD and UN MC) of 10 or 12 sq m can hardly be used by more than one person. The same holds true for a room where the taxpayer runs a noisy machine."

78. It is also well accepted that a place of business would not be construed at the disposal of a person rendering services if it is made available to the said person only for the purpose to discharge his functions. To illustrate the same; a Chartered Accountant may be provided a space in the office of its client for the purpose of auditing the books of accounts of the said client. Although, the auditor may have an unhindered access, the space at his client's office cannot be construed his fixed place of business. This is because the access to the space is limited for the purposes of providing services to the specified client. A Chartered Accountant can neither service his other clients from the said premises nor use the same at his will to carry on any of his other activities. The Supreme Court had also referred to the decision of Canadian Federal Court of Appeal[5] ruling that a self-employed engineer who had access to his customers premises to perform the services required under his contract but had no control over the premises because he had access only during the customers regular office hours

[5] William Dudney v. R., (1999) 99 DTC 147 (Can)

and was not entitled to carry on business of his own from the said premises.

79. The duration for which the fixed place of business is at the control of the Chartered Accountant may not be material. In ***Formula One World Championship Ltd. v. Commissioner of Income Tax, International Taxation-3, Delhi & Anr.***[1], the Supreme Court held that the appellant in that case had a PE in India and had carried on its business through a fixed place of business – Buddh International Circuit. The said track was owned by Jaypee Sports International Ltd. (an Indian Company). The appellant (Formula One World Championship Ltd.) had granted the right to host the Formula One Grand Prix of India (event) to Jaypee Sports International Ltd. The Supreme Court accepted the finding that the appellant had full access through its personnel, to the said place (Buddh International Circuit) and could also dictate who are authorized to enter the areas reserved for it. Although, the said access was granted only two weeks prior to the event and continued till one week succeeding the date of event; the Court found that the appellant had sufficient control in respect of the said premises to be construed as its fixed place of business.

80. In view of the above, the issue to be addressed is whether the Assessee had sufficient control over the premises of the Hotel for the same to be construed at its disposal for carrying on its business.

81. The Tribunal examined the terms of the SOSA and found that the Assessee had sufficient control over the premises. The Tribunal noted

that the term of the SOSA was twenty years and this lent some permanency to the arrangement. The Hotel was to be operated as part of "H1" chain of Hotels. The Tribunal noted that it was agreed that in terms of Section 4 of Article I of SOSA, if the Owner desired to avail financial assistance 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 was obliged to secure from any such lenders a non-disturbance and attornment agreement acceptable to the Assessee.

82. The Tribunal noted that the Assessee had complete control and discretion in formulating and establishing an overall general strategic plan with regard to all aspects of the operation of the Hotel. It was further noted that the SOSA specifically recorded that the right of the Owner to receive financial returns from the Hotel could not be construed to give the Owner any right and obligation with regard to the operation and management of the Hotel other than as set forth in the SOSA.

83. The Tribunal concluded that the SOSA not only provided the Assessee with unrestricted right to access the Hotel premises but also complete control over such premises. The Tribunal accepted that in view of the length and duration of the use by the Assessee and the non-invasive activities being carried out from the Hotel, the Assessee had certain amount of physical space at its disposal in the form of the Hotel premises.

84. There is no dispute that it is not necessary that an enterprise has a legal and exclusive control in respect of the fixed place of business for the same to be construed at its disposal. The plain test is to determine whether *de facto* the enterprise had sufficient control over the fixed place for the purpose of carrying on its business. It is relevant to note that SOSA was one amongst other agreements that were entered into contemporaneously. Whereas the SOSA was for providing overarching strategic services for management of the Hotel, the HOSA was for day to day management of the Hotel.

85. In terms of Section 4 of Article I of SOSA, the owner had warranted that it would maintain full ownership of the Hotel and subject to Section 2 of Article XVI of SOSA, keep the said property clear from any lien, encumbrances, covenants, charges and burdens of claim other than those that do not materially and adversely affect the Assessee's performance on the services for the benefit of the Hotel. As noticed by the Tribunal, in terms of SOSA, the Owner was not entitled to use the Hotel as a collateral unless it obtained non-disturbance and attornment agreements acceptable to the Assessee from such lenders. It was obvious that this was to ensure that the Assessee's ability to continue performing the SOSA and realise its fees was not adversely affected by the Owner creating any encumbrance on the Hotel. The relevant extract of Section 4 of Article I of the SOSA is set out below:

"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 full 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."

86. The term of the SOSA was twenty years and it could be extended by a further period of ten years. Section 3 of Article III of SOSA expressly provided that the Assessee had no obligation and was not expected to assign any of its employees to India on a permanent basis. However, it did have the sole discretion to assign any one or more of its employees or employees of its affiliates to India on occasional basis. The relevant extract of Section 3 of Article III is set out below:

> "**Section 3. Oversight and Strategic Planning Services**
>
> ...Strategic Services Provider will have no obligation, and will not be expected to assign any of its employees to India on a pe1manent 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."

87. In terms of Section 7 of Article III, the assessee was also required to identify, recruit as well as assist in appointing any non-local employees of the Hotel including the General Manager, expatriate personnel and key executives of the executive members. It also had the right to assign its employees temporarily as full-time members of the executive staff of the Hotel and the owner was required to reimburse the entity or the hotel from which such employees were assigned in terms of the secondment agreement or arrangement.

88. It is also relevant to refer to Section 2 of Article III of SOSA. In terms of the said Section 2, it was agreed that the Assessee would have complete control and discretion in formulating and establishing the overall and general strategic plan with regard to all aspects of the operation of the Hotel including training, branding, marketing, product development and day-to-day on-site operations.

89. The Assessee may be correct in its submission that it was not required to carry on day-to-day management of the Hotel. However, it would be erroneous to accept that the agreements entered into by the Assessee did not provide a pervasive control. This is also apparent

when one considers that the SOSA was entered simultaneously with Hyatt India (an affiliate of the assessee) entering into the agreement for managing the day-to-day operations of the Hotel. There is no dispute that the day-to-day management of the Hotel was required to be conducted in the manner and in terms of the policy and guidelines laid down by the Assessee. Article III of SOSA indicates that the policies would cover every aspect of functioning of the Hotel.

90. It is important to note that six senior employees of the assessee had visited India during the said term. The job description clearly indicate that they had exercised certain amount of supervisory control in respect of various activities of the Hotel. Considering the nature of function coupled with the fact that the Assessee could depute its employees at its discretion, we find no infirmity with the decision of the Tribunal accepting that the Hotel premises would be sufficiently at the disposal of the Assessee through which it carries on its business.

91. It is apparent from the plain reading of the SOSA that the Assessee exercised control in respect of all activities at the Hotel, *inter alia*, by framing the policies to be followed by the Hotel in respect of each and every activity, and by further exercising apposite control to ensure that the said policies are duly implemented. The Assessee's affiliate (Hyatt India), was placed in control of the day to day operations of the Hotel in terms of the HOSA. This further ensured that the policies and the diktats by the Assessee in regard to operations of the Hotel were duly implemented without recourse to the Owner. As noted above, the

Assessee had the discretion to send its employees at its will without concurrence of either Hyatt India or the Owner. This clearly indicates that the Assessee exercised control over the premises of the Hotel for the purposes of its business. Thus, the condition that a fixed place (Hotel Premises) was at the disposal of the Assessee for carrying on its business, was duly satisfied. There is also little doubt that the Assessee had carried out its business activities through the Hotel premises. Admittedly, the Assessee also performed an oversight function in respect of the Hotel. This function was also carried out, at least partially if not entirely, at the Hotel premises.

92. The Assessee is correct in its submission that there is no provision in the SOSA, which entitled the Assessee to carry on any activity or business in respect of any other hotel from the premises of the Hotel. However, there is no specific bar that proscribed the Assessee's employees from making decisions or issuing policies in respect of management of other hotel while they were stationed or visiting the Hotel Premises in connection with rendering services under the SOSA. Since the Hotel premises were at the disposal of the Assessee in respect of its business activities, we find no infirmity with the Arbitral Tribunal's decision holding that an Assessee had a PE in India in the form of a fixed place through which it carried on its business.

93. Given the nature of the Assessee's business, it is difficult to accept that the Assessee's senior employees deputed in India would completely be insulated from addressing the issues of other hotels under the management of the Hyatt Group, while they were at the Hotel.

94. In view of the above, the question no.(ii) is answered in the affirmative.

Re Question No.(iii)

95. Insofar as the Tribunal's finding that the Assessee has a fixed place of business in India as it has sufficient control over the operations of the Hotel, this Court finds no infirmity with the same.

96. It is not necessary to examine whether the Assessee has a PE under Para 2 of Article 5 of the DTAA as the Tribunal has proceeded on the finding that the Assessee has a PE in terms of Article 5(1) of the DTAA. This is apparent from the Tribunal's conclusion in Paragraph 58 of the impugned order.

97. Insofar as the Tribunal's finding that the payments made are in the nature of royalty under Article 12 of the DTAA is concerned, we are unable to concur with the conclusion of the Tribunal as set out in paragraph 60 of the impugned order.

98. The question no.(iii) is answered accordingly.

99. We note that the Tribunal had also given an opportunity to the Assessee to submit its working regarding apportionment of revenue,

losses etc. on a financial year basis so that the profits attributable to the PE can be determined judicially. We confirm the said direction. Obviously, this is subject to the determination in respect of question no. (iv).

100. We direct that this order be placed before the Acting Chief Justice for referring the said question to a Larger Bench in view of our reservations in regard to the earlier decision of this Court in ***Commissioner of Income Tax (International Taxation)-2 v. M/s Nokia Solutions and Networks***[3].

VIBHU BAKHRU, J

AMIT MAHAJAN, J

DECEMBER 22, 2023
RK/gsr