

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.:-5759/Del/2011
Assessment Year: 2008-09

Bellsea Ltd. Julia House, 3th Dervis Street, CY 1066, Nicosia, PO Box 23589, CY-168, Nicosia Cyprus PAN AADCB4030D	Vs.	ADIT International Taxation, Circle-1(1) New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Ravi Sharma, Advocate
Department by :	Shri G.K. Dhall, CIT (DR) Intt. Taxation
Date of Hearing	13/04/2018
Date of pronouncement	06/07/2018

ORDER

PER AMIT SHUKLA, J.M.

The aforesaid appeal has been filed by the assessee against final assessment order dated 13.10.2011, passed u/s 143(3)/144C (13) of the Income Tax Act, 1961, by Assistant Director of Income Tax (International Taxation) Circle 1(1), New Delhi (hereinafter called the AO), in pursuance of the directions given by the Dispute Resolution

Panel (DRP), vide order dated 02.08.2011 for assessment year 2008-

09. In grounds of appeal assessee has raised following grounds:-

1. *“On the facts and in the circumstances of the case and in law, the learned Assistant Director of Income-tax (International Taxation) - 1(1) ('ADIT') has erred in proposing and the Dispute Resolution panel (DRP) has further erred in upholding / confirming the action of the ADIT in holding that the activities of the Appellant constitutes a Permanent Establishment ('PE') under Article S(2)(g) of the Double Taxation Avoidance Agreement between India and Cyprus ('Tax Treaty') and thereby computing taxable income of Rs. 5,84,96,79S (being 10% of gross receipts of Rs. 58,49,67,946) by applying provisions of Section 44BB of the Income-tax Act, 1961 ('IT Act').*
2. *On the facts and in the circumstances of the case and in law, the learned ADIT has erred in proposing and the DRP has further erred in upholding / confirming that the Appellant (who was a subcontractor) was responsible for multifarious functions under the contract and not mere rock placement functions by incorrectly referring to scope of work of the main Contractor (Allseas Marine Contractors SA).*
3. *On the facts and circumstances of the case and in law, the learned ADIT has erred in proposing and the DRP has further erred in upholding / confirming the date (i.e. September 2007) of visit of the employee for collection of data and information for tendering of the contract as the date of commencement for computing the threshold period of the PE instead of April 2008 when the project execution started or at best 25 February 2008 when the vessels arrived in India for the purpose of execution of project.*
4. *On the fact and circumstances of the case and in law, the learned ADIT has erred in not granting credit of taxes withheld of Rs. 8,77,45,192.*

5. *On the facts and circumstances of the case and in law, the learned AD IT has erred in levying interest of Rs. 1,06,22,376 under section 234B of the IT Act despite the fact that there was no tax payable after granting credit of tax deducted at source and even otherwise, the Appellant was not liable to discharge any advance tax, since it is a non-resident whose entire income is tax deductible at source.*

6. *On the facts and circumstances of the case and in law, the Learned ADIT has erred in initiating penalty proceedings under section 271(1)(c) of the I.T. Act.”*

2. The facts in brief are that the assessee company, Bellsea Limited is a company incorporated in Cyprus and is a tax resident of Cyprus. The assessee is mainly engaged in the business of dredging and pipeline related services to oil and gas installations. During the relevant financial year, the assessee was awarded a contract by Allseas Marine Contractors SA (herein after referred to as AMC) for placement of rock in sea bed for protection of gas pipelines and umbilical of subsea structures in oil and gas field developed at Krishna Godavari Basin, East Coast of India. Under the terms of the contract, the work was intended to commence from 4th January, 2008 which has been mentioned as “effective date” in the contract. Under the said contract itself, the completion of the work was reckoned from the date issuance of completion certificate by AMC. Since the completion certificate was issued in the month of September, 2008,

the completion date was thus taken as 30th September, 2008. Thus, according, to the assessee since the contract lasted for less than 12 months which is the threshold period for the establishment of PE in India in terms of Article 5(2) (g), of India Cyprus DTAA, therefore, it was claimed by the assessee that no income earned from such contract can be attributed or taxed in India. During the course of assessment proceedings, the assessee filed a copy of the contract, work completion certificate, certificate issued by Custom Authorities for certifying the date of conversion and reversion of the vessels, i.e., arrival and departure of the vessels in India. The assessee's submission before the AO in this regard has been dealt at pages 2 and 3 of the impugned assessment order. Ld. AO after examining the scope of work, deduced that assessee was carrying various functions as per the contract which has been enumerated at page 4 of the assessment order which for the sake of ready reference is reproduced herein below:-

“5.2 Upon examination of scope of work of the assessee the following functions to be performed by the assessee are noted-

- Detailed engineering, design and analysis*
- Procurement of bulk items and material and equipment*
- Manufacture, fabrication and testing*
- QA/QC*
- Project planning*
- Interface management*

- *Transportation*
- *Pre-engineering and pre-construction surveys*
- *Sea-bed preparation*
- *Pre- Trenching*
- *Post trenching*
- *Installation of offshore and onshore facilities*
- *Burial/ Engineered Backfill*
- *Post -installation and as built survey*
- *Pigging and hydro-testing of all pipelines and subsea flow-line and chemical jumpers*
- *Pre commissioning of the subsidiary-sea production system.*
- *Mechanical completion, testing and pre-commissioning of all subsidiary-sea system components and SSIV s*
- *Commissioning assistance*

5.3 *It is also relevant to note that assessee has single point responsibility towards amongst other things the following-*

- *Project management*
- *Preparation of detailed procedures in accordance with equipment suppliers*
- *Guidelines/recommendations and obtain vendor approval for procedures.*
- *Attendance and inspection during FAT at company assigned suppliers.*
- *Vendor works.*
- *Interface with company appointed equipment vendors during engineering for providing installation inputs.*

- *Obtain all permits required to perform the work under the scope, except those provided by the principal.*
- *Mobilisation and demobilization of vessels, support equipment, materials and manpower.*

From the above activities, he came to the conclusion that the assessee was responsible for multifarious functions. Thus, from terms of contract and scope of work it cannot be said that role of the assessee was limited to mere rock placements in river sections, so as to fall within ambit of Article 5(2)(g) of the India Cyprus DTAA. Lastly, he held that even if the assessee's contention is accepted that its activities are covered u/s 5(2)(g), then also they constitute a PE, because one of the employee of the assessee Mr. Harry Beljaars has come to India as early as on September, 2007 to collect data and information and despite asking the assessee to provide the details of employees who stayed in India has not been furnished. Hence, he concluded that the assessee has rendered service for a period of more than 12 months and therefore, there is an installation PE; and accordingly, he computed the income u/s 44 BB, that is, @ 10% of gross receipt of Rs. 58,49,67,946/-.

3. Ld. DRP by and large confirmed the action of the AO in so far as establishment of PE in India u/s 5(2) (g) and observed that assessee's activity under the contract does constitute installation PE in India.

4. Before us the Ld. Counsel for the assessee, Shri Ravi Sharma submitted that to hold PE under Article 5(2)(g), it is *sine-qua-non* that the duration test of 12 months has to be satisfied. If the threshold period of 12 months has not exceeded, then installation PE cannot be established. Clause (g) of Article 5(2) is basically an activity based and therefore, while examining the terms of contract the entire functions and activities carried out by the assessee has to be seen, as to what are the activities carried out by the assessee in India under the terms of the contract. Drawing our attention to various clauses of the contract, he first of all submitted that assessee has given its 'intent' to AMC to undertake all the works concerned with rock dumping and spreading and it has represented for construction, installation, rock dumping etc. The scope of function and work as incorporated by the AO in the impugned order was in fact outline and scope of work which AMC has to undertake for its contract with its principal. The assessee was given responsibility of only part of the work which has been given in section 3 of the "Scope of work" which is appearing at pages 335 to 337 of the contract. Under the said scope of work the assessee was required to carry out rock transport and delivery which included transportation and safety measures; scope of supply and construction, installation of the temporary facilities and site restoration. All the activities which have been noted by the AO and also endorsed by the DRP in fact pertained to AMC and not to the assessee. This fact is

clearly borne out from the contract and is also evident from the payment schedule as appearing in page 309 of the contract. Thus, the very premise on which AO has proceeded to hold that assessee is carrying out multifarious functions so as to hold that assessee's activities constitute a PE is completely divorced from the facts and material on record. The assessee's activities under the contract if at all can be said to have commenced would be the 'effective date' on which the contract has commenced, which was 4th of January, 2008. This he pointed out is clear from clause 2 of the contract given at page 175. Even the completion date has been mentioned under the definition clause which is 1st August 2008. Thus, both the commencement and completion date has been specifically defined under the contract and therefore, there cannot be any inference to hold that the commencement had started prior to that date. He also drew our attention to the payment schedule and the break up alongwith the invoice date giving activity wise details; and pointed out that, first activity of mobilisation started on 23rd February, 2008 and was actually completed with demobilisation date which was 25th September, 2008. Thus, even if the actual activity conducted by the assessee in terms of contract is to be seen, then it was much less than period of 12 months. He further drew our attention to the other clauses of the contract like project execution plan which was to be submitted within three weeks of the effective date i.e. 4th January,

2008, hence the kick off date is post 4th January, 2008. Hence, in no way it can be inferred that any kind of activity qua the installation contract had commenced before the 4th January, 2008. In so far as the allegation of the AO that one of the employee of the assessee had visited India in September, 2007, he submitted that he had visited India purely for preparatory work like collecting of data and information necessary for tendering purposes and not for any kind of installation activity. Such kind of activities much prior to awarding of the contract cannot be treated as part of installation activity as stipulated in Article 5(2) (g). In support of his contention, he strongly relied upon the judgment of the Hon'ble Delhi High Court in the case of **National Petroleum Construction vs. Director of Income Tax**, reported in **386 ITR 648**, wherein the Hon'ble Jurisdictional High Court has categorically held that assembly project or installation PE can only be construed as a fixed place of business only when an enterprise commences its activity at the project site. An activity which may be related or incidental to the project but which is not carried out at the site in the source company would not constitute as PE. Here in the present case, the ratio laid down by the Hon'ble High Court if applied, then under no circumstances it can be held that there is any kind of PE of assessee in India.

5. On the other hand Ld. CIT (DR), first of all emphatically relied upon the assessment order and directions of the DRP. He further submitted that the 'contract' itself indicates that the assessee's personnel were required to visit India and assessee's employee did visit India in the month of September, 2007 and the activity continued much beyond September 2008. That is, the assessee was involved in the installation project much before the effective date of contract (4th Jan, 2008) for the purpose of carrying out the activities in relation to the contract. The date of arriving of vessel/barge should not be taken as a date of commencement of the activities for the purpose of computing the duration in Article 5(2) (g), because the entire activity *qua* the contract has to be taken into account. In order to prove this point, he specifically drew our attention to various clauses of the contract and highlighted the points in his written submission, which for the sake of ready reference is reproduced herein below:-

1. *PB page 165 point (E): "(E) The Contractor has further represented to the Company that the Contractor has made itself aware of the marine conditions, technical feasibility and the rules and regulations applicable to the carrying out of and completion of the Works (as such term is defined below) and, on this basis, the Contractor has satisfied itself that it has the requisite expertise, capability, availability of manpower and infrastructure (with capacity to augment these) and is willing to carry out and complete the Works by the Completion Date (as such term is*

defined below) in accordance with the Contract." (Emphasis provided)

2. *PB page 194: "Clause-8.3. The Contractor confirms that it has, prior to the Effective Date (and in addition to its obligations under Clause 8.2) completed, and kept updated, a full review, on an ongoing basis up to the Completion Date ..." (Emphasis provided). Thus, activities carried on prior to the contract date should be viewed as an extension/continuation (ongoing basis) rather than exclusion for the purpose of computation of the duration of activities within the meaning of Art. 5(2)(g) of DTAA.*
3. *PB page 195: "Clause-8.4(A) "Any works not expressly referred to in this contract but inherently necessary to complete the works shall be carried out by the Contractor and shall be deemed to be included in the Basic Contract Price." (Emphasis provided)*
4. *PB page 330: "The scope of work shall also include pre-engineering survey and soil investigation studies as deemed necessary by Contractor to supplement Company provided data." (Emphasis provided)*
5. *PB page 358: That the assessee had made extensive study and survey of the site much before the effective date of the contract is also clear from the fact that the contract itself requires that following are to be provided on day "zero" (Emphasis provided) since the Effective Date:*
 - a. *MDR and schedule*
 - b. *Execution Plan*
 - c. *Contract Schedule*

The highlighted/underlined portions indicate that the assessee was required to, and had made, extended study of, and consequently stay near, the site much before the effective date.

This is what the AO has emphasized and for this the details of the visit and stay of the project manager Mr. H. Beljaars (PB page 279) was called for. Unfortunately, although Mr. Beljaars had been to India since as early as September 2007, (Refer DRP page-4, para-3.2.2), the assessee has not provided the relevant details (stay, passport / visa stampings).

6. *PB page 295 - 295: The Schedule 13 'Responsibility Matrix' of the assessee (contractor) as well as that of the 'company'. The Responsibility of the assessee includes:
 - a) *Transportation Engineering and Construction Engineering (points 1.5 and 1.7). This goes to show that the work is much more intricate than mere dumping / filling of rocks. The site is under water or at least offshore. These would have required the assessee to be at the site to study and prepare for even accepting / signing the contract.*
 - b) *Fabrication (point 3): This requires onshore activities.*
 - c) *Surveys (point 5.10): Also includes pre-installation survey. This indicates that the work was not as simple as made out to be.*
 - d) *Point 7.3: Establishing onshore storage / coating / fabrication / supply bases to support construction operations. This shows onshore 'permanent' place of work.*
 - e) *Point 7.5: Assessee had to "Obtain all permits and Authorisations."**
8. *Authorizations from Regulatory Authorities: PB page 363 Section 12.1 indicates that the assessee has to obtain Authorizations from about 11 (eleven) Regulatory Authorities. This would certainly have taken immense prior work as envisaged by the AO (Para 6).*

9. *Compliance with Laws: PB page 364 Section 12.5.1 requires the Contractor (assessee) to "make all arrangements for necessary compliance" with 29 Laws. This would have certainly required deep on site involvement and study much before the effective date as envisaged by the AO (Para 6 thereof). This is apart from the various studies required to be done (PB 341- 345).*
10. *Onshore Office at Site / Onshore Base / Offshore Office at Site: PB pages 398 - 401 - The assessee (contractor) is required to maintain (i) Onshore Office at Site (ii) Onshore Base (iii) Offshore Office at Site. These requirements are stated in quite detail. It is notable that even an office is to be maintained on the ship / vessel along with necessary telecommunication and courier facilities (apart from regular cabins etc.).*

Completion of work

12. *PB page-221: "Clause 17.2 (B). The Company shall, within 30 days of the receipt of contractor's application either:
 - 1) *Sign the Completion Certificate and listing on a punch list all items of the works to be rectified or completed...*
 - 2) *Reject the application**

In the light of above, if the contention of the assessee is accepted, there would be 3 dates of completion of the activities, i.e.,;

- A. *25th September 2008 (i.e. date of departure of the last vessel/barge- page-36 of PB-1)*
- B. *30th September 2008 (i.e. the date of completion as per completion certificate- page 49 of PB-1)*
- C. *16th November 2008 (i.e. 30 days before the date of signing of completion certificate as per Cl. 17.2 (B) of contract as referred to above)*

13. *PB page 222: "Clause 17.7 Final Completion - The contractor shall only be entitled to apply for the Final Completion Certificate once the following conditions have been satisfied:*

A. The Company has issued the Completion Certificate pursuant to Clause 17.3 and any punch list items listed.....have been completed.....

B. The contractor has provided the As-Built Drawings.....

C.

D. The contractor is in compliance with all of its other obligations.....(Emphasis provided)

Seen against the above backdrop, the date of completion of activities is not the date of completion or the date of issuance of a certificate of completion as per Clause 17(2) or Clause 17(3) of the contract, but rather the Final Completion Certificate issued under Clause-17(8) (PB page-223) of the contract. The Completion Certificate produced by the assessee (page-49 of PB-1) is issued under Clauses 17.2 and 17.3 only and not under Clause 17.8 as provided in the Contract and hence cannot be taken as the date of the completion of the activities for the purpose of computation of the duration of activities within the meaning of Art. 5(2) (g) of DTAA."

6. Thus, he submitted that the date of commencement and the date of completion cannot be taken from the 4th January, 2008 to 25/30th September, 2008, because for the reasons stated above by him. Accordingly, he concluded that here in this case the threshold period of 12 months had crossed and therefore, there is PE in terms of (5)(2)(g).

7. We have heard the rival submissions, perused the relevant finding given in the impugned orders as well as material referred to before us at the time of hearing. The assessee is a Cyprus based company which was awarded contract by another foreign entity Allseas Marine Contractors S.A, (AMC) for placement of rock in seabed for laying of gas pipelines and providing umbilical for sub structures in oil and gas field developed at Krishna Godavari Basin. The AMC was awarded a contract from the Reliance group and Niko Resources for extraction of gas and for laying of gas pipeline. In order to carry out its contract work AMC has given a contract to the assessee company for the placement of rock in the oil and gas field. The scope of work of AMC has been elaborated at page 329 of the Contract which has been noted by the AO and also incorporated by us in the foregoing paragraph 2. However, the AO has inferred that this scope of work is to be done by the assessee which is not correct, because the assessee's activity under the 'scope of work' has been given in Section 3 of the Contract which has been elaborated at page 335 of the contract which reads as under:-

3. DETAILED SCOPE OF WORK

This section provides more detail regarding the Contractor's scope of work and provides a detailed description for the works to be executed under this contract.

3.1 Rock Transport and Delivery

Detailed activities shall be performed for Rock Protection Placement through Rock Dumping.

3.1. 1 Transportation

The rock materials will be free issued by Company / Principal.

The Contractor shall undertake sufficient precautionary measures regarding the transport of rock materials, to demonstrate that all materials can be transported safely over the selected route to the installation site and placed as per requirements.

Contractor shall be responsible for obtaining approval of the sea fastening from the Marine Warranty Surveyor and Company during mobilization and demobilisation.

3.1.2 Safety Measures

Provide unloading procedures and manuals for each operation covering vessel preparation, load out, and transportation. These procedures shall include but not be limited to:

- Unloading procedures*
- Details of proposed equipment*
- Anchor handling and anchor pattern*

All procedures shall be subject to Company and CVA review and approval,

Perform HAZOP /HAZID and QRA activities relevant to rock dumping work scope. Attend other HAZOP and QRA workshops as required by Company.

3.2 Scope of Supply

Company will provide FIM via its other contractors, as detailed in Section 16. With the exception of FIM, Contractor shall procure all

materials including temporary, permanent and consumable materials required for execution of the work. These shall include;

Temporary installation aids

Consumables and spares for installation

All equipment and marine spread as required

Contingency equipments

All first aid and safety supplies

Sea fastening materials

Complete survey and positioning equipment

Any other equipment, material, supplies, services not specifically mentioned herewith but required to carry out the scope of work.

Contractor shall carry out expediting, inspection, surveillance of vendor works whenever required to ensure that the purchased equipment and items will meet all quality requirements and will be delivered to meet the project schedule.

3.3 Construction and Installation of the Temporary Facilities

Contractor shall arrange and install all the temporary facilities to enable the works. All the temporary facilities shall be removed and the work site shall be restored to its original condition.

Rock dumping activities include:

Contractor is responsible for the transporting and placing of a maximum of 1,00,000 Te of rock materials which will be delivered FoB by Dredging Contractor at LFP jetty1 (Current scope of work is based on a 1,000,000 Te rock backfill. The optimal methodology and amount is currently reviewed.)

- *The rock protection as per the base scope requirements will be placed between LFP and KP 17.4*

3.4 *Not Used*

3.5 *Not used*

3.6 *Not used*

3.7 *Site Restoration*

Upon completion of the Work, Contractor shall remove from the site all temporary work, scrap, surplus materials, construction facilities and equipment provided by Contractor, and shall remove debris and garbage. Any such material dumped into the sea shall be subject to recovery at Contractor expense.”

8. From the above scope of work, it can be deduced that it is purely with regard to rock transport and delivery, supply of material and equipment, construction, installation of the temporary facilities, rock dumping activities and site restoration. All other activities enumerated by the AO *qua* the assessee is not correct. Here the moot question is, whether the scope of work under the contract and the activities carried out by the assessee in respect of the aforesaid work had crossed the threshold period of 12 months given in Article 5(2)(g) of India-Cyprus DTAA. For the sake of ready reference Article 5(2) (g) reads as under:-

“A building site, construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continues for a period of more than twelve months.”

9. Ergo, to constitute a permanent establishment under this clause, it is *sine qua non* that the activities defined therein should be carried out/or is continued for a period of more than 12 months. In other words, if this threshold period is not crossed then such an activity cannot constitute a PE in India. The revenue's case is that; *firstly*, one of the employee of the assessee company had visited India in September, 2007 and thereafter activities of the assessee had started from September, 2007; *secondly*, prior to the effective date of 4th Jan 2008, a full review was undertaken before entering into contract and thus, the activities carried out prior to the contract date should be treated as extension/continuation of the installation activity; *thirdly*, there was pre-engineering survey and soil investigation studies under the scope of work for which assessee has made surveys much before the effective date which is 4th January,2008; *fourthly*, the assessee has not provided any relevant details of arrivals and stay etc., of the employees visiting India prior to the date of contract; *fifthly*, the responsibility matrix as appearing in Schedule 13 shows that assessee was required to carry out other various activities which required pre installation activities and also to obtain various permits and authorisations which has also been taken as part of installation activity itself; and *lastly*, the completion certificate as given by the assessee does not reflect the final completion, because there was a condition that final completion

certificate would be given once various conditions have been satisfied and till the final completion certificate is issued the activity of the project has to be construed as continuing.

10. From the material placed on record, we find that prior to the entering of the contract, one of the employees of the assessee company, Mr Harry Beljaars had visited India sometime in September, 2007 for the purpose of collecting data and information necessary for tendering purpose and to bid for the contract. Before entering into contract with AMC such preparatory work like pre-survey engineering, investigation of site, etc., for tendering purpose without actually entering into the contract and installation of project cannot be held that the activity *qua* the installation project has started. Here one important fact to establish the threshold period prior to effective date provided in the contract, has neither been brought by the Revenue nor is borne out from the records, that the assessee has installed any kind of project office or developed a site before entering into the contract with the AMC for carrying out any preparatory work. Auxiliary and preparatory activity, purely for tendering purpose before entering of the contract and without carrying out any activity of economic substance or active work *qua* that project cannot be construed as carrying out any activity of installation or construction. Clause (g) of Article 5(2) ostensibly refers to activity based PE, because the main

emphasis is on “*where such site project or activity continues for a period of more than 12 months.*” The duration of 12 months *per se* is activity specific qua the site, construction, assembly or installation project. If the contract would not have been awarded, then any kind of preparatory work for tendering of contract cannot be reckoned for carrying out any activity as stipulated in this clause. Hence, in this case all such preparatory work for tendering purpose before entering into contract cannot be counted while calculating the threshold period. Situation would be different if after the contract/work has been awarded/assigned and then if any kind of active work of preparatory or auxiliary nature is carried out, it could be counted for determining the time period.

11. This principle has been well discussed by the Hon’ble Delhi High Court in the case of **National Petroleum Construction Company** (supra), wherein the Hon’ble High Court was analysing similar terminology appearing in Article 5(2) (h) of Indo-UAE Treaty wherein similar phrases have been used. The relevant observation and ratio laid down by the Hon’ble High Court reads as under:-

“33. In terms of clause (h) of paragraph 2 of Article 5 of the DT AA, "a building site or construction or assembly project or supervisory activities in connection therewith" would also constitute a PE of an enterprise subject to that site, project or activity continuing for a period of at least nine months. Clearly, the

purpose of the said clause is also to include a building site or a construction or an assembly project as a PE by itself. On a plain reading, **a PE constituted by a building site or a construction or an assembly project, would commence on the commencement of activities relating to the project or site.** The said clause is also to be read harmoniously with paragraph 1 of Article 5 of the DT AA which necessarily entails a fixed place of business from which the business of an enterprise is carried on. **Thus, a building site or an assembly project could be construed as a fixed place of business only when an enterprise commences its activity at the project site. An activity which may be related or incidental to the project but which is not carried out at the site in the source country would clearly not be construed as a PE as it would not comply with the essential conditions as stated in paragraph 1 of Article 5 of the DTAA.** It is necessary to understand that a building site or a construction assembly project does not necessarily require an attendant office; the site or the attendant office in respect of the site/project itself would constitute a fixed place of business once an Assessee commences its work at site. **Thus, for clause (h) of paragraph 2 of Article 5 to be applicable, it is essential that the work at site or the project commences - it is not relevant whether the work relates to planning or actual execution of construction works or assembly activities. Preparatory work at site such as construction of a site office, a planning office or preparing the site itself would also be counted towards the minimum duration of a PE under Article (2)(h) of DTAA.** In a given case, establishment of an office or any work which directly serves the operations at site may also be construed as a part of

*the building site, or construction or assembly project. **The essence of a PE under Article 5(2) (h) is a building site or a construction or assembly project and the activities of an enterprise relating thereto in the source country.***

34. At this stage, it would also be relevant to refer to the following extract from the commentary by Klaus Vogel on "Double Taxation Conventions, Third Edition":-

"the minimum period begins when the enterprise starts to perform business activities on the spot in connection with a building site or construction or assembly project. The term 'on the spot' should, in these instances, not necessarily be taken to denote the actual place where the building works, etc., are to be accomplished, for instance, in cases where a planning office for the construction work is installed at some other place. In such an event, preparatory and ancillary work is already connected with the building works proper, provided the former directly serve the operation of the building site (likewise Ost BMF 3 SWI 19 (1993): DTC Austria; USSR). Providing for such an early beginning of the minimum period is the best way of taking the technical and economic nature of building works into account and it also avoids the practical difficulties of having to draw the line between ancillary activities and 'building works proper'"

35. The aforesaid passage also clearly indicates that **the duration of a Permanent establishment would commence with the performance of business activities in connection with the building site or assembly project.**

36. The activities at site carried on by any contractor through a sub-contractor would not count towards the duration of the contractor's PE, as in that case, the construction site or project

cannot be construed as a fixed place of business of the contractor and would fail one of the essential tests of paragraph I of Article 5 of the DTAA. This, of course, would not hold good if the contractor's office or establishment- in the source country (i.e. where the site/project is located) is also involved along with the sub-contractor.

37. In the present case, the Assessee claims that the survey was conducted by an independent third party engaged by the Assessee and that too for a period of 9 days in one instance and 27 days in another (from 27.02.2006 to 07.03.2006 and 25.04.2006 to 21.05.2006). The Assessee commenced its activities at site when the barges entered into the Indian Territory on 19.11.2006 and such activities relating to the installation, testing and commissioning of the platforms continued till 27.04.2007. Thus, the Assessee's activity at site would indisputably commence on 19.11.2006 and continue till 20.04.2007, that is, for a period of less than nine months.

[Emphasis in bold is provided by us]

12. The ratio as culled out from the aforesaid judgment is that a building site or an assembly project can only be construed as a fixed place of business only when an enterprise commences its activities at the project site. Any activity which may be related or incidental but was not carried out at the site in the source country would clearly not be construed as a PE. *Albeit*, preparatory work at the site itself can be counted for the purpose of determining of duration of PE. However, in the present case there is no such allegation or material on record that

any kind of preparatory work had started at the installation sites prior to 4th of Jan 2008. The period from which it can be reckoned that enterprise has started to perform the activities in connection with installation project or site etc. is when the actual purpose of the business activity had started. The performance of the activities in the present case can only be reckoned from 4th January, 2008 (even though ld. Counsel stated that first mobilisation of vessel/barge was 23rd February, 2008); and not before that as the preparatory work if any, was for tendering purpose and to get the contract.

13. In so far as the date of completion, the Contract provides the completion date of 1st August, 2008, whereas as per the material placed on record and also the payment schedule etc., points out that all the activities connected with the project including the receiving of the payments was before 30th September 2008 and even the completion certificate mentions 30th September 2008. Though certain formalities for final completion certificate may have exceeded one or two months but still it will not make the continuity of the activity where it has been brought on record that the last barge sailed out or was decommissioned from India on 25th September, 2008 and the entire payments were received on or before that date. The activity qua the project comes to an end when the work gets completed and the responsibility of the contractor with respect to that activity comes to

end. Here activity of the assessee qua the project as per the terms of contract had come to an end on or before 30th September, 2008 for the reason that; *firstly*, last sail out of barge/vessel was 25th September 2008 and Customs authorities have also certified the demobilisation by this date; *secondly*, all the payments relating to contract work were received by the assessee much before the closing of September, 2008; *thirdly*, the completion certificate too mentions the date of completion as 30th September, 2008, though the formalities of final completion certificate may had exceed uptill November 2008, but the date mention for completion in the certificate is 30th September 2008 only; and *lastly*, there is nothing on record to suggest that any activity post completion has been carried out beyond 31st December, 2008 or the project of the assessee was not completely abandoned before the period of 12 months. The contentions raised by the Ld. CIT DR in his submissions, both for the starting period and final end date of the installation project is without any factual material to support. His inference are based on presumptions that for carrying out such a work and to comply with the certain conditions of Contract there must have been substantive activity before the effective date; and after the date of decommissioning of the project/ demobilisation certain formalities must have been carried out. Such a contention sans any corroborative material cannot be accepted, because the onus is heavily upon the revenue to establish that that assessee's activity had crossed the

threshold period of 12 months and hence constitutes PE in India in terms of Article 5(2)(g) so as to tax the receipts in India as per Article 7.

14. Thus, on the facts and material on record and in view of our reasoning given above which is in consonance and in line with the principle laid down in the Hon'ble Jurisdictional High Court, we hold that threshold period of 12 months have not exceeded in the present case and consequently no PE can be said to have been established in Article 5(2)(g) . Accordingly, we hold that no income of the assessee on the Contract executed by assessee in India can be held to be taxable in terms of Article 7. Thus grounds raised by the assessee on this score is allowed.

15. In view of our finding given above the other grounds raised vide ground No. 5, 6 and 7 have been rendered purely consequential.

15. In the result appeal of the assessee is allowed.

Order pronounced in the Open Court on 6th July, 2018.

sd/-

(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 06/07/2018

Veena

Copy forwarded to

1. Applicant
2. Respondent

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi