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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 90/2019

**THE COMMISSIONER OF INCOME TAX - INTERNATIONAL
TAXATION -1**

..... Appellant

Through: Mr.Ruchir Bhatia, Sr.Standing
Counsel.

versus

BELLSEA LTD.

..... Respondent

Through: Mr.Prakash Kumar, Advocate with
Ms.Rashmi Singh, Advocate.

+ ITA 357/2022

**THE COMMISSIONER OF INCOME TAX - INTERNATIONAL
TAXATION -1**

..... Appellant

Through: Mr.Ruchir Bhatia, Sr.Standing
Counsel.

Versus

BELLSEA LTD.

..... Respondent

Through: Mr.Prakash Kumar, Advocate with
Ms.Rashmi Singh, Advocate.

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Date of Decision: 15th November, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

Signature Not Verified

Digitally Signed By: ASWANT
SINGH RAWAT
Signing Date: 16/11/2022
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J U D G M E N T

MANMOHAN, J (Oral):

1. Present Income Tax Appeals have been filed challenging the Orders dated 6th July, 2018 and 18th November, 2019 passed by the Income Tax Appellate Tribunal ('ITAT') for the Assessment Years 2008-09 & 2009-10.
2. Learned Counsel for the Appellant states that the ITAT has erred in not appreciating that Article 5(2)(g) of the India Cyprus Treaty refers to PE as construction, assembly or installation project or supervisory activities in connection therewith where such activities continue for a period of more than twelve months. He emphasises that the ITAT has erred in holding that the threshold period of twelve months has not been exceeded in present case and consequently no Permanent Establishment ('PE') can be said to have been established in accordance with Article 5(2)(g) of India Cyprus Treaty on the basis of the dates mentioned in the contract.
3. He further states that ITAT has erred in disregarding the fact that activities of the assessee at the site had started in September, 2007 i.e., prior to the contract date. He contends that the finding of the ITAT suffers from perversity as it ignores that the assessee did not provide any details of arrival of stay etc. of the employees visiting India prior to the date of contract thereby seeking to avoid the rigours of Article 5(2)(g) of India Cyprus Treaty.
4. The ITAT in the impugned order has dealt at length with the contentions advanced in the present appeals. The relevant portion of the impugned order for one of the assessment years i.e., 2008-09 is reproduced hereinbelow:-

“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.”

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12. The ratio as culled out from the aforesaid judgment is that a building site or an assembly project can only be construed at 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 demobilization 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 have exceeded upto 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.”

(emphasis supplied)

5. Article 5(2)(g) of the India Cyprus Treaty 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."

6. This Court in the case of ***National Petroleum Construction Company Vs. Director of Income Tax (International Taxation), 2016 SCC OnLine Del 571*** has analysed a similar clause being Article 5(2)(h) of the India UAE DTAA. The relevant portion of the said judgment is reproduced hereinbelow:-

34. In terms of clause (h) of paragraph 2 of Article 5 of the DTAA, “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 atleast 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 DTAA 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 5(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.

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36. 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.

7. This Court is of the view that no material has been placed before us to impugn the Tribunal's finding that work had commenced at the site only on or after 4th January, 2008. It is settled law that preparatory work like travelling for obtaining tender/contract cannot be deemed to be the starting point of the contract. Consequently, this Court finds no perversity in the findings of fact rendered by the Tribunal. Accordingly, no substantial question of law arises for consideration in the present appeals and the same are dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 15, 2022

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