

RE-SHAPING THE PE LANDSCAPE:
A DETAILED ANALYSIS OF THE RECENT
***HYATT INTL. SOUTHWEST ASIA* RULING**

Vikram Vijayaraghavan
Advocate, SAPR Advocates



Hyatt International ruling:

Facts of the case

- Hyatt International South West Asia Ltd ('the taxpayer' or 'Hyatt UAE', in short) is a company incorporated and fiscally domiciled in the United Arab Emirates (UAE).
- Under two Strategic Oversight Services Agreements (SOSA), dated 4th September 2008, Hyatt UAE rendered certain services to the two hotels owned by a company, then known as Asian Hotels Limited, in **New Delhi and Mumbai**.
- **Per Appellant:** Strategic service fees paid to UAE Co not FTS (article absent!), hence business profits of UAE Co not taxable in India **with no PE in India**
- **Per AO:** Based on SOSA, and the facts, Appellant **had a Fixed PE** under Article 5(1) and **Service PE** under Article 5(2)



Hyatt International ruling: **Which brings us to the question...**



What is a
**Permanent
Establishment?**



What is this
SOSA?

Hyatt International Ruling

What is a PE? - Part I

DTAA Articles: Article 5 - PE - Example from OECD MC

Article	What it covers	Type of PE
Article 5(1)	Basic Rule	Fixed base PE
Article 5(2)	Illustrative list	Fixed base PE
Article 5(3)	PE in relation to projects	Construction & Service PE
Article 5(4)	List of exclusions	Exclusions from Fixed base PE
Article 5(5)/5(6)	Dependent & Independent Agent	Agency PE
Article 5(7)	Associated Enterprise	Subsidiary PE

CIT v. Vishakapatnam Port Trust (44 ITR 146 AP)

"The words Permanent Establishment postulate the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another, which can be attributed to a fixed place of business in that country. It should be of such a nature that it would amount to a virtual projection of the foreign enterprise of one country onto the soil of another country.

- Circular No. 14 of 2001 ([2001] 252 ITR (St.) 65, 107) clarified that term PE not been defined in Act but its meaning understood from DTAA.
- However, vide Finance Act, 2002, the definition of PE was inserted in the Act under **S.92F(iia)** which states that the PE includes a fixed place of business through which the business of the enterprise is wholly or partly carried on.
- Morgan Stanley [2007] 292 ITR 416 (SC) observed that the PE is an inclusive definition covers service PE, agency PE, construction PE, etc.

Hyatt International Ruling

What is a PE? - Part II

India-UAE DTAA: 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.*

Hyatt International Ruling

What is a PE? - Part III

India-UAE: 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.

} Fixed
place PE

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.

} Service PE

Hyatt International Ruling

What is a PE? - Part IV

3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

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

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

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

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

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

Aux/Prep
not a PE

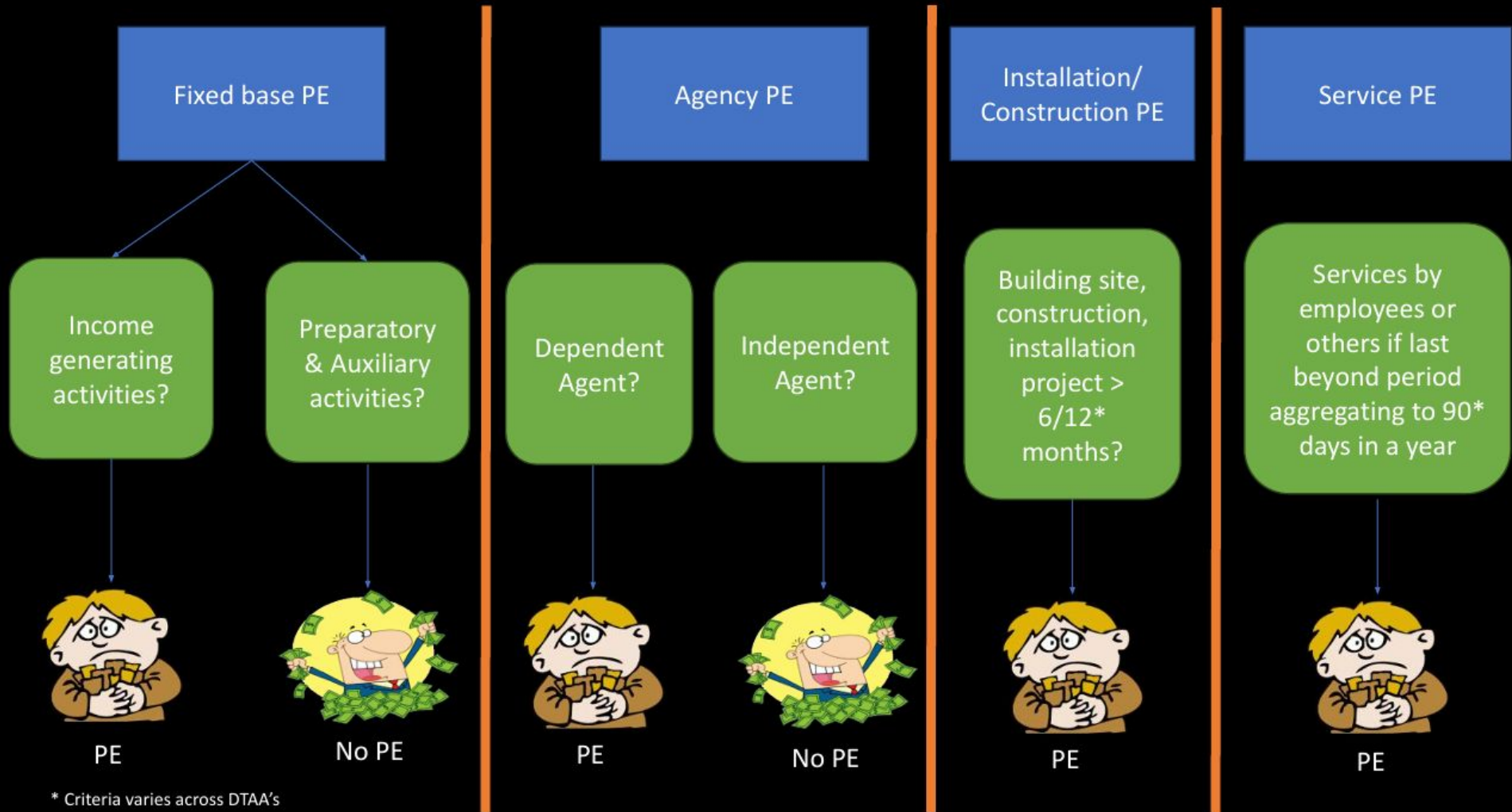
.....

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

DAPE

Hyatt International Ruling

What is a PE? - Part V



* Criteria varies across DTAA's

Hyatt International Ruling

Analysis of SOSA - I

Section	Pertains to	SC finding
Section 4 Article I	'title to the hotel'	if hotel owner desires to obtain financial assistance for construction or refinancing of the hotel or used as collateral unrelated to the hotel business – the owner required to obtain a non-disturbance and attornment agreement from the lender acceptable to the assessee .
Section 1, 2 Article II	Duration	SOSA is to remain in force for a term of 20 years from effective date (extension by 10yrs on mutual agreement)
Section 1 Article III	Operation of hotel	<ul style="list-style-type: none"> Hotel shall be operated in accordance with standards comparable to international hotels operated by Hyatt Intl. Hyatt Intl responsible for providing strategic plans, policies, procedures, and guidelines to ensure adherence to 'Hyatt Operating Standards'. Obligation to use reasonable efforts to avoid conflicts between Hyatt branded hotels and subject hotel.
Section 2 Article III	Operation of Hotel – Strategic control	UAE Co vested with complete control and discretion in formulating and establishing the strategic plan for all aspects of hotel operations, including branding, marketing, product development, and <i>daily operations</i> .

Hyatt International Ruling

Analysis of SOSA - II

Section	Pertains to	SC Finding
Section 3 Article III	Operation of Hotel – Use of Premises, Asst. of employees	UAE Co to assign employees to India without needing prior approval from the hotel owner or management. The UAE Co is responsible for formulating policies relating to human resources, procurement, guest admittance, use of premises, pricing, sales and marketing, and reservations.
Section 4 Article III	Operation of Hotel – Banking	Authorizes UAE co to formulate policies governing the hotel's operating bank accounts.
Section 7 Article III	Operation of Hotel – GM etc.	UAE Co to identify, recruit and assist in appointing non-local hotel employees- including GM , key personnel, and members of the Executive Committee- on behalf of the hotel owner. UAE Co may also temporarily assign its own employees to serve as full-time executive staff at the hotel.

Hyatt International Ruling

Analysis of SOSA - III

Section		Pertains to	SC Finding
Section 1(a), 1(b) Article V		Strategic Fees	<p>“Strategic Fees” for the services provided is not a fixed fee; instead, it is calculated as a percentage of room revenue and other revenues and income- whether directly or indirectly derived from the hotel’s operations - well as cumulative gross operating profit.</p> <p><i>“SC : This remuneration structure clearly reflects an active commercial involvement, linking the assessee’s income to the financial and operational performance of the hotel.”</i></p>

Timeline of Proceedings

8 Ays: 2009-10 to 2017-18 (except 2015-16)

Sno	Forum	Date	Citation	What happened?
1	ITAT (A/A)	4 th December 2019...	ITA 579/2013....	Against assessee
2	Delhi HC DB (A/A)	14 th March 2023	464 ITR 508 (Del)	4 subst. questions of law admitted <ul style="list-style-type: none">• 1 in favour of assessee (on Royalty)• 2 against (on PE existence)• 1 referred to FB (on PE profit attrib.)
3	Delhi HC FB	19 th September 2024	472 ITR 53 (Del FB)	1 question - Against Assessee
4	SC (A/A)	24 th July 2025	CIVIL APPEAL NO. 9766-9773 OF 2025	Against Assessee

Hyatt International Ruling

Decisions relied on by Appellant before AO/DRP – Part II

- **Fee earned under SOSA arrangement** was ONLY for rendering *“assistance in formulating, establishing the overall strategic plans, policies.....in accordance with the Hyatt Operating Standards”*. Hyatt India, a separate legal entity, takes care of daily operations
- **No PE** because Hyatt UAE had *“no fixed place of business, office or branch in India and (since) the presence of its employees...has not exceeded nine months in India”*
- **ITAT SB Motorola Inc. Vs DCIT [TS-21-ITAT-2005(DEL)]** relied on: *“merely demonstrating that certain space available to the non resident is not enough and for the PE, the non-resident must have a place/ premises at its disposal as a matter of right”*. Several other judicial precedents, OECD Commentaries etc relied on.
- Without prejudice, contended that residuary income under **‘Other Income’ of Article 22** of Indo-UAE tax treaty will be taxed only in residence jurisdiction i.e. UAE
- As for PE profits, DRP held *“25% of gross receipts as taxable income attributable to the permanent establishment”*. Submitted Hyatt UAE ***“has incurred huge operating losses as depicted by its audited annual financial statements and therefore no profit or taxable income is otherwise attributable to the ...PE in India”***



Hyatt International Ruling

Revenue's stance

- **Fixed place PE:** Taxpayer (UAE Co) had *"a fixed place of business at its disposal throughout the year in the hotel premises of its customer throughout the year in the hotel premises of its customer in India, including the chambers of its Managing Director" and "its expatriates were continually present in India and are actually operating the hotels belonging to the owner in each and every manner"*.
- **Service PE:** *"the contention of the assessee is incorrect as the operative word regarding duration is 'activities' and not 'stay' in India".* Employees have stayed beyond requisite period
- **Continuous activity:** *"The activities under the agreement were carried out throughout the year. It is of no relevance that employees came and left, restricting their stay in India. The activities undertaken by them in pursuance of consultancy services were continued throughout the year"*.
- **Control+Fees:** SOSA was examined at length, which highlighted, inter alia, control over all parts of the functioning of the hotel, the hotel premises being at their disposal, and assessee getting fees, including not only 0.5% of hotel revenues but also 7% of cumulative gross operating profit.





The facts speak for themselves.

Demosthenes

Hyatt International Ruling

HC: Questions of law

HC heard all **eight appeals together** and framed the following substantial questions of law for consideration:

- (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 agreement 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?* 

Hyatt International Ruling

HC: Reference to Full Bench - Consequences

- The HC appeals were thus adjudicated upon in **piecemeal manner**- partly by DB judgment (22.12. 2023) and partly by FB judgment (19.09. 2024). Hyatt UAE filed SC appeals against DB judgment before Full Bench answered.
- **IMO: What has been adjudicated by SC so far is bunch of appeals against the Hon'ble Delhi High Court DB judgment dated 22nd December 2023.**
- The correctness of the FB judgment dated 19th September 2024, dealing with the PE profit attribution issue in case of the global loss situation by the general enterprise is, to that extent, an issue yet to be adjudicated upon though SC seems to have made some observations....
- CIT vs. Nokia Solutions And Networks OY; ITA 503 of 2022, 2.12.22 overruled by Full Bench! [Para 66]

PE Profit Attribution (OECD vs UN vs India)

Approach	Principle	Methodology	Fallback if accounts absent/inadequate
OECD Model (Art. 7, AOA)	PE = treated as if separate & independent enterprise	Arm's length pricing via TP methods (CUP, TNMM, Profit Split); full "subsidiary-style accounts"	No arbitrary apportionment; attribution must still mirror subsidiary accounts
UN Model (Art. 7)	Source-country friendly; profits "directly or indirectly"	Arm's length basis + allows apportionment by turnover, sales, etc.	Explicitly allows formulaic apportionment
India (ITA + treaties)	Legally OECD-aligned, but practically closer to UN	Sec. 9(1)(i); income attributable to PE taxable; Rule 10: AO may adopt "reasonable method"	Rule 10 empowers AO to apply formulaic/percentage method if accounts aren't available/adequate

Illustration: In Hyatt, AO assumed 25% net profit of receipts due to lack of accounts

Hyatt International Ruling

Assessee's contentions before the SC - Part I
SOSA, HOSA, SAMOSA.....

- **SOSA is rendering hotel consultancy & advisory only. It explicitly stipulates that the appellant shall render its services from Dubai and is not obligated to send or station any employee in India.** However, the agreement permits at the appellant's sole discretion, occasional and temporary visits by its employees to India.
- Role of Appellant limited to **strategic guidance, brand compliance, and long-term planning.**
- Day-to-day operations of the hotel were carried out by **Hyatt India Pvt. Ltd**, under a separate Hotel Operating Services Agreement (HOSA) entered into with the hotel owner. Appellant had no involvement in such daily management.
- High Court **erred in conflating the two separate legal agreements** – the *SOSA* entered into by Appellant and *HOSA* entered into by Hyatt India Pvt. Ltd. – and mistakenly attributed the day-to-day control of hotel operations to the appellant.

Hyatt International Ruling

Assessee's contentions before the SC – Part II

Formula One not followed properly

- HC disregarded **two essential conditions laid down in *Formula One SC decision***:
 - a) There must be a **specific, fixed, and identifiable physical location in India**; *and*
 - b) Such location must be **at the disposal of the foreign enterprise** for use in carrying out its own business activities.
- There was no designated space or office at the hotel premises in Delhi or Mumbai that was either specifically reserved for or placed at the disposal of the appellant.
- The appellant exercised no control or dominion over any part of the premises.
- Mere involvement in policy decisions or enforcement of brand standards does not amount to a fixed place of business PE.
- Ownership and operational control of the hotel remained entirely with the Indian entity, as reaffirmed by Article 1, Section 3 of the SOSA.

Hyatt International Ruling

Assessee's contentions before the SC: Part III

Employee visits & Absence of restriction

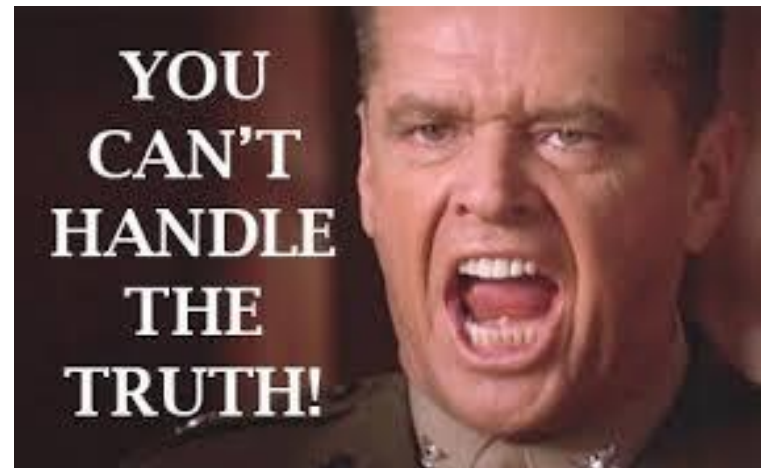
- Appellant submitted HC laid undue emphasis on fact that **six employees** of visited India and stayed at hotel premises during the relevant years. These visits, however, were *brief and routine in nature* and the same visited other Hyatt hotels across India including those in Goa, Bengaluru, Kochi, and Chennai.
- These **oversight visits** were to ensure brand uniformity and quality compliance. Short duration across multiple locations, and lack of exclusive use or control over any space do not satisfy legal requirement of a fixed place of business PE.
- Department failed to produce documentary evidence to establish that any such designated space was ever placed at the disposal of the appellant.
- HC incorrectly inferred that the absence of an express prohibition in the SOSA on decision-making by appellant's employees during their stay at the hotel implies a right of disposal. In law, **a fixed place of business PE cannot be presumed from the mere absence of a restriction; there must be an affirmative grant of a right to use a specific physical location to carry on the enterprise's own business.**

Hyatt International Ruling

Revenue before the SC – Part I

Full & unconditional disposal

- On 04.09.2008, Appellant entered into SOSA with AHL for providing oversight services in relation to the hotel for a period of **20 years**.
- Under the SOSA, they had more than mere access to the hotel premises – **the premises were at the appellant's full and unconditional disposal**.
- Appellant's business was carried on through the employees stationed at the hotel, thereby satisfying criteria of a fixed place of business Permanent Establishment (PE) under Article 5 of the Indo-UAE DTAA.

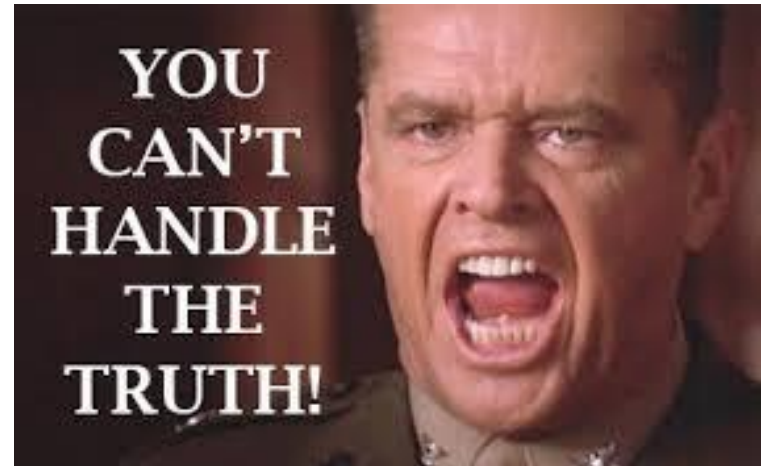


Hyatt International Ruling

Revenue before the SC – Part II

Facts, facts & more facts

- Clauses of the SOSA, show Appellant's role extended beyond high-level policy formulation and into the domain of actual implementation.
- Appellant was involved in *appointment and training of staff, monitoring daily operations, exercising financial oversight, and influencing procurement and operational decisions* - all of which demonstrate managerial and functional control, particularly through the General Manager, who reported to the appellant.
- Documentary evidence include records of names, roles, and durations of stay of the appellant's employees posted at the hotel. Some individuals remained in India for up to 9 months & were involved in substantive hotel operations.
- **Bottomline: Appellant had full and effective control over hotel premises and premises were indeed at its disposal for conducting its business.**



Hyatt International Ruling

SC decision: Principal issue

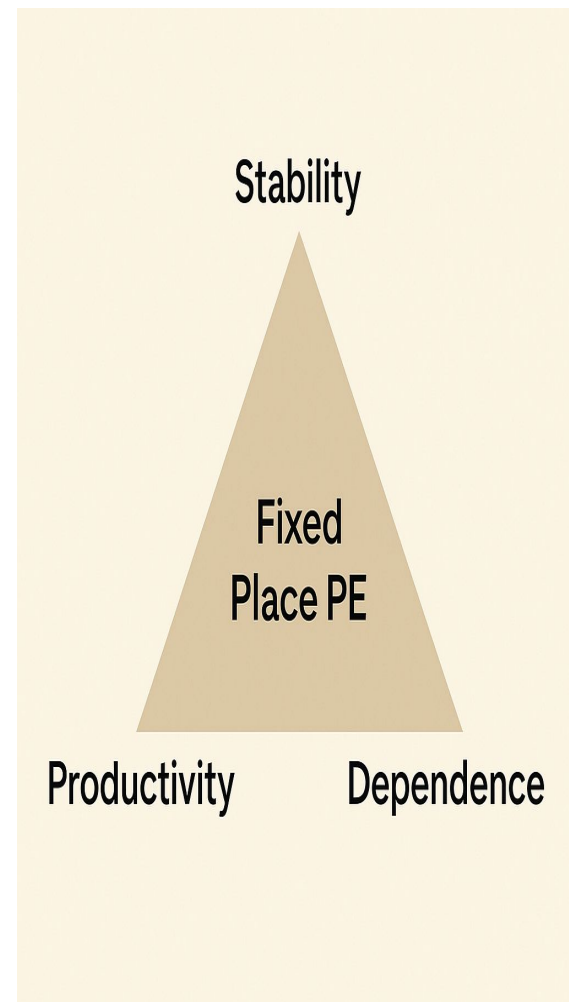
Para 10 of the SC

“(t)he principal issue that arises for determination herein is whether the appellant Hyatt International Southwest Asia Ltd., a tax resident of the UAE, has a Permanent Establishment (PE) in India under Article 5(1) of the Indo- UAE Double Taxation Avoidance Agreement (DTAA), and consequently, whether its income derived under the Strategic Oversight Services Agreement (SOSA) is taxable in India”

Hyatt International Ruling

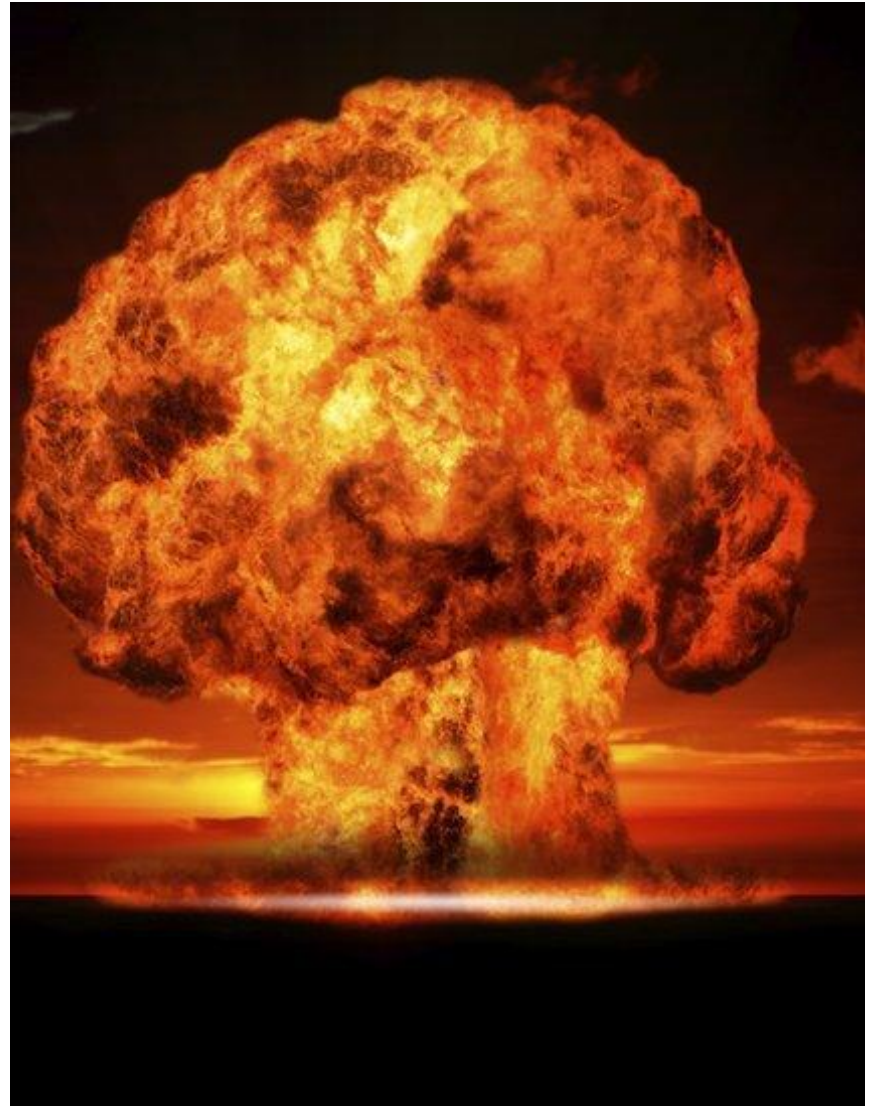
SC decision: Principal issue

- Reliance on ***Formula One World Championship Ltd vs CIT, (2017) 15 SCC 602*** where UK co entered into a Race Promotion Contract (RPC) with Jaypee Sports Intl Ltd. (India) to host F1 GP India.
- SC had held for a fixed place PE to exist, **two conditions** must be met:
 - (a) there must be a fixed place of business, and
 - (b) through that place, business of enterprise must be wholly or partly carried on.
- Although FOWC's claimed it only had access to the race circuit for few weeks a year (and F1 race was only for 3 days), Court noted contract term extended to 5 years (renewable to 10), and FOWC had full control during race period.....the premises constituted a PE
- SC also referred to the OECD Commentary [para 40(c), 40(d)] to clarify **duration of access is not determinative in itself – the right of disposal, conduct of business through premises are core tests.**
- Three key features of a PE: **stability, productivity, and dependence.** Applying to **Hyatt**, **stability** (20-year term), **productivity** (fee linked to business outcomes), and **dependence** (reliance on hotel infra & staff)



Hyatt International Ruling SC decision: Bottomline

12.4. From the contractual provisions detailed above, **it is evident that the appellant's role was not confined to mere policy formulation.** On the contrary, the SOSA conferred upon the appellant a continuing and enforceable right to implement its policies and ensure compliance in all operational aspects of the hotel. **The degree of control and supervision exercised by the appellant clearly transcends a mere advisory capacity and aligns with the criteria for a Fixed Place Permanent Establishment (PE) under Article 5(1) of the India – UAE DTAA.**





Hyatt International Ruling SC key points

- SC holds that among all the tests, **the “disposal test” is pivotal**, meaning thereby the enterprise must have a right to use the premises in such a way that enables it to carry on its business activities.
- **‘This test is to be applied contextually, taking into account the commercial and operational realities of the arrangement.’**
- Philip Baker: “Trading with a country vs Trading in a country”

Hyatt International Ruling

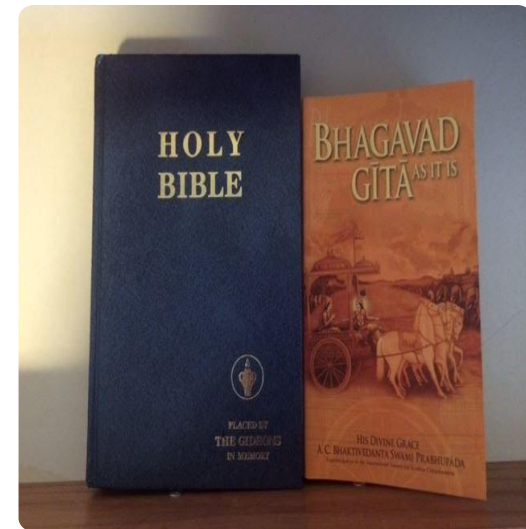
SC: Following *Formula One*...

*“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.**”*

*34.2. In a case generally referred to as **Hotel Manager** [Bundesfinanzhof, 3-2-1993, IR 80-81/91, IStR 1993, p. 226, (1993) BStBl, II, 462], the Bundesfinanzhof held that a **UK hotel management company had a PE in Germany when it entered into a 20 year contract with a limited partnership which owned a hotel**. The agreement required the UK company to supply a general manager: the general manager's office constituted the PE (and not the entire hotel) since the UK company had a secured right to use this office for the purposes of the agreement.*

....

*35. According to Philip Baker, the aforesaid illustrations confirm that the **fixed place of business need not be owned or leased by the foreign enterprise**, provided that it is at the disposal of the enterprise in the sense of having **some right to use the premises for the purposes of its business and not solely for the purposes of the project undertaken on behalf of the owner of the premises**.*



Hyatt International Ruling

SC: Following *Formula One*...

38.....***“The degree of control depends on the type of business activity that the taxpayer carries on. It is therefore not necessary that the taxpayer is able to exclude others from entering or using the POB. ”***

....

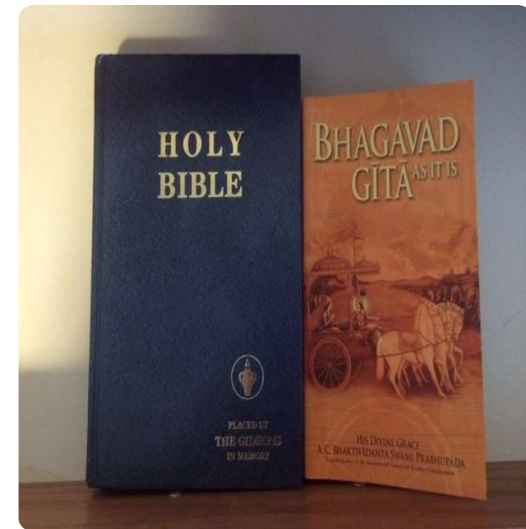
In contrast, purely intangible property cannot qualify in any case...They can only form part of PE constituted otherwise.

...

Neither does the mere incorporation of a company in a contracting State in itself constitute a PE of the company in that State.

....

A certain amount of space at the disposal of the enterprise which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is required.



Hyatt International Ruling SC DECISION: SOSA Smash...

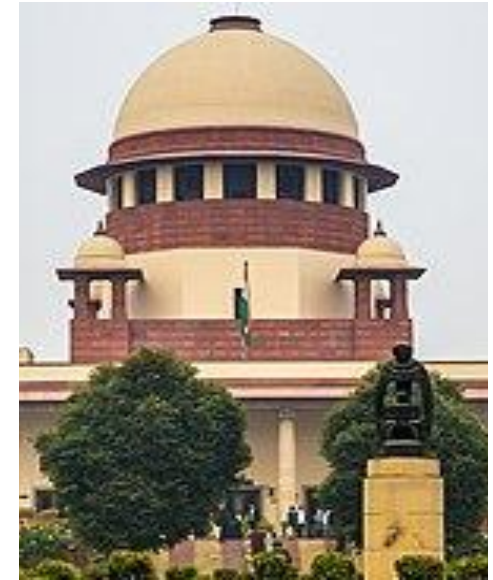
- Detailed review of the SOSA executed between the appellant and AHL demonstrates that the appellant exercised **pervasive and enforceable control over the hotel's strategic, operational, and financial dimensions.**
- These rights go well beyond mere consultancy and indicate that **the appellant was an active participant in the core operational activities of the hotel.**



Hyatt International Ruling

SC DECISION: Demolition of specific arguments

- Argument that absence of specific clause in SOSA permitting conduct of business from hotel negates PE existence is **without merit**. In *Formula One*, test is not whether formal right of use is granted, but whether, in substance, premises were *at disposal* of enterprise, used for conducting core business.
- Daily operations were handled by **Hyatt India Pvt Ltd.**, a separate legal entity, **does not decisively support its case**. It is well established that **legal form does not override economic substance in determining PE status**. Extent of control, strategic decision-making & influence exercised clearly establish that business was carried on through hotel premises, satisfying conditions of Article 5(1).
- Reliance on *E-Funds SC decision* is **wholly misplaced and distinguishable**.



Hyatt International Ruling

SC DECISION: Actions speak louder than words

- Undisputedly Appellant's executives, employees made frequent and regular visits to India to oversee operations and implement SOSA.
- Findings of AO, **based on travel logs** and job functions, establish continuous and coordinated engagement, even though no single individual exceeded the 9-month stay threshold. **Under Article 5(2)(i), relevant consideration is continuity of business presence in aggregate, not length of stay of each individual employee**
- Once it is found that there is continuity in the business operations, intermittent **presence or return of particular employee becomes immaterial, insignificant in determining the existence of PE**



Hyatt International Ruling

SC decision : Finale

- HC correct in concluding that the appellant's role **was not confined to high-level decision making, but extended to substantive operational control and implementation.**
- Appellant's ability to enforce compliance, oversee operations, and derive profit-linked fees from hotel's earnings demonstrates a clear, continuous commercial nexus and control with the hotel's core functions.
- **This nexus satisfies conditions necessary for the constitution of a Fixed Place PE Permanent Establishment under Article 5(1) of the India – UAE DTAA.**





Hyatt International Ruling Summary: SC Held - PE Exists.

- Hyatt had **enforceable control** under SOSA
- **Right of disposal** over premises existed (even without title/lease)
- **Employees rotated**, but business continuity remained
- **Substance > Form** - operational control trumped structure

Bottomline: Conditions for PE under Article 5(1) met



Hyatt International SC ruling: Things that haven't changed – Part I Profit Attribution

*“We also note the reference made to a Larger Bench of the Delhi High Court in Hyatt International Southwest Asia Ltd v. Additional Director of Income Tax, where it was held that profit attribution to a PE in India is permissible even if the overall foreign enterprise has incurred losses. Accordingly, the question no.(iv) referred was answered in the affirmative, **reinforcing the principle that taxability is based on business presence and not the global profitability of the enterprise.**”*



SC Obiter Dicta....not law
CIT vs. Sun Engg. Works (P.) Ltd., (1992) 4 SCC 363

Hyatt International SC ruling: Things that haven't changed – Part II

Article 5(2) - Service PE

1. [ITAT on Service PE - Art 5(2)(i)- Para 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.....Thus, the period of stay is stipulated only in relation to the invocation of Article 5(2) but not with regard to Article 5(1) of the DTAA. **Thus, we hold that based on the DTAA of Indo-UAE under Article 5(1), the assessee is having a permanent establishment in India***

2. [Delhi HC on Service PE – Para 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 ”.

3. [SC- Para 21]

*“21. It is undisputed that the appellant's executives and employees made frequent and regular visits to India to oversee operations and implement the SOSA. The findings of the assessing officer, based on travel logs and job functions, establish continuous and coordinated engagement, even though no single individual exceeded the 9-month stay threshold. **Under Article 5(2)(i) of the DTAA, the relevant consideration is the continuity of business presence in aggregate not the length of stay of each individual employee.** Once it is found that there is continuity in the business operations, the intermittent presence or return of a particular employee becomes immaterial and insignificant in determining the existence of a permanent establishment”*

Note: Assessee's puzzling argument in para 4.1 on “not a Service PE”. Was it for “*especialia generalibus derogant*” defence?

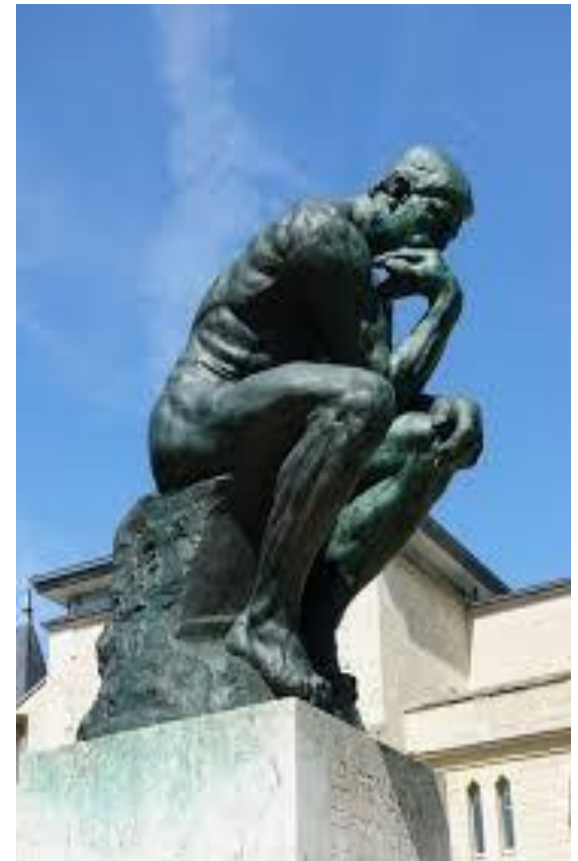
Bottomline: SC made some observations about Service PE under Article 5(2)(i), even though these were used only to approve Delhi HC finding about existence of PE under Article 5(1)

Hyatt International Ruling

Points to Ponder - I

! Implications for Industry

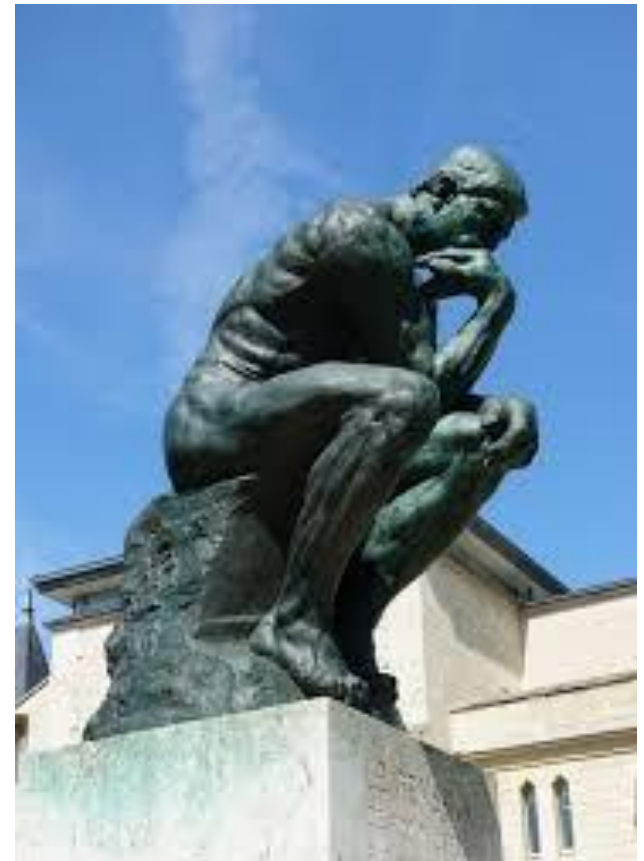
1. Pay attention to structure of MNC hand-holding, guidance & direction
 2. Mere group brand oversight & “strategy” can lead to PE
 3. Multiple agreement structures = no immunity
 4. Service PE threshold is effectively diluted
 5. Profit attribution even in global loss years
 6. More scrutiny of expat travel patterns & email chains
- **Substance over Form : Double-edged sword**
 - Helps assessee in few cases....but could give power to Department to taken an open-ended interpretation
 - **Theory of Law vs Practice of law** are two very different things in India



Hyatt International Ruling

Points to Ponder - II

- **Contract vs Income Tax**
 - Business reality vs taxation
 - Contract drafting: Important to keep it simple, precise
 - Remember “**Commission Agent**” disallowances on CBDT Circular withdrawal
- **But beyond drafting, facts matter....**
 - What actually transpired.



Hyatt International Ruling

Points to Ponder - III

- Where are we heading? Evolution more complicated economic & business models, leads to more *intangible* components
 - “Brand” - AMP
 - “Management services” - TP
 - “At Disposal” under PE law



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Points to Ponder - IV

- This is the trailer only....
 - Let PPT and MLI's kick in properly! Even more open-ended!
 - TRC *look-through* battle is a good example of where it is going...



Thanks!

vvikram@saprlaw.com

vvikram@gmail.com

<https://www.saprlaw.com>

