Union Of India vs U.A.E.Exchange Centre on 24 April, 2020

Equivalent citations: AIR 2020 SUPREME COURT 2933, AIRONLINE 2020 SC 537

Author: A.M. Khanwilkar

Bench: Ajay Rastogi, A.M. Khanwilkar

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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9775 OF 2011

Union of India & Anr.

Versus

U.A.E. Exchange Centre

JUDGMENT

A.M. Khanwilkar, J.

1. The respondent is a limited company incorporated in the United Arab Emirates (UAE). It is engaged in offering, among others, remittance services for transferring amounts from UAE to various places in India. It had applied for a permission under Section 29(1)(a) of the Foreign Exchange Regulation Act, 1973 (for short, "the 1973 Act"), pursuant to which approval was granted by the Reserve Bank of India (for short, "the RBI") vide letter dated 24.9.1996. The same reads thus: -

> "Telegrams RESERVE BANK OF INDIA Post Box No. 1055 "RESERVBANK" EXCHANGE CONTROL DEPARTMENT Fax No.: 022-2665330 BOMBAY CENTRAL OFFICE 022-2654121 CENTRAL OFFICE BUILDING Ref. No. EC Co. FID(I)/137/10-I-05-02/3975 (Activity)/96-97 BY AIR MAIL/REGISTERED A.D. U.A.E. Exchange Centre L.L.C., 24 Sep 1996 Post Box 170, Abu Dhabi, UAE.
>
> Dear Sirs, Permission under Section 29(1)(a) of the Foreign Exchange Regulation Act, 1973 for opening a liaison office in India Please refer to your application dated

Nil and the correspondence resting with your letter Ref. UAEEC/HO/479/96 dated 9th August, 1996 on the captioned subject.

2. We advise that we are agreeable to your establishing a liaison office at Cochin initially for a period of three years to enable you to i) respond quickly and economically to enquiries from correspondent banks with regard to suspected fraudulent drafts, ii) to undertake reconciliation of bank accounts held in India, iii) to act as a communication centre receiving computer (via Modem) advices of mail transfer T.T. stop payments messages, payments details etc., originating from your several branches in UAE and transmitting to your Indian correspondent banks, iv) Printing Indian Rupee drafts with facsimile signature from the Head Office and counter signature by the authorised signatory of the Office at Cochin, v) following up with the Indian correspondent banks.

3. Please note that this permission has been granted subject to the following conditions:

i) Except the above mentioned work, the office in India will not undertake any other activity of a trading, commercial or industrial nature nor shall it enter into any business contracts in its own name without our prior permission.

ii) No commission/fees will be charged or any other remuneration received/income earned by the office in India for any activity undertaken by it as listed in para 2 of this letter or otherwise in India.

iii) The entire expenses of the office in India will be met exclusively out of the funds received from abroad through normal banking channels

iv) The Liaison office in India shall not borrow or lend any money from/to any person in India without our prior permission.

v) The office in India shall not acquire, hold (otherwise than by way of lease for a period not exceeding five years), transfer or dispose of any immovable property in India without obtaining prior permission of the Reserve Bank of India under Section 31 of the Foreign Exchange Regulation Act, 1973.

vi) The Liaison office in India will furnish to our Cochin Regional Office (on a yearly basis):

a) a certificate from the auditors to the effect that during the year no income was earned by/or accrued to the office in India;

b) details of remittances received from abroad duly supported by Inward Remittance Certificates;

c) certified copy of the audited final accounts of the office in India; and

d) annual report of the work done by the office in India, stating therein the details of actual remittances received from NRI through your office during period in respect of which the office had rendered liaison services.

e) The number of staff engaged/appointed and duties assigned to each staff.

vii) The incharge of the liaison office in India will not have signing/commitment powers except than those which are required for normal functioning of liaison office on behalf of the Head Office.

viii) The liaison office will not render any consultancy or any other services directly/indirectly, with or without any consideration.

4. In case you desire to open a head office account in the books of your liaison office in India, we hereby grant you our approval to maintain such an account subject to the conditions that the credits to the account should represent the funds received from head office through normal banking channels for meeting the expenses of the office and no other amount should be credited without prior permission of the Reserve Bank. Similarly debits to this account could be raised only for meeting the local expenses of the office. Audited transcript of the head office account may be forwarded to our Cochin Regional Office alongwith the annual accounts mentioned above.

5. It is further clarified that the permission granted hereby is limited to and for the purpose of the provisions of Section 29 ibid only and shall not be construed in any way as regularising, condoning or in any manner validating any irregularities, contraventions or other lapses if any under the provisions of any other law for the time being in force.

6. Please note to furnish to us the postal address of your liaison office in due course for our record. You may also note to address the correspondence in future to our Cochin Regional Office.

7. Please acknowledge receipt.

Yours faithfully, Sd/-

(Prashant Saran) Deputy General Manager"

2. The respondent set up its first liaison office in Cochin, Kerala (India) in January, 1997 and thereafter, in Chennai, New Delhi, Mumbai and Jalandhar in India. The activities carried on by the respondent from the said liaison offices are stated to be in conformity with the terms and conditions prescribed by the RBI in its letter dated 24.9.1996. The entire expenses of the liaison offices in India are met exclusively out of funds received from UAE through normal banking channels. Indisputably, it is asserted by the respondent that its liaison offices undertake no activity of trading, commercial or industrial, as the case may be. The respondent has no immovable property in India otherwise

than by way of lease for operating the liaison offices. No fee/commission is charged or received in India by any of the liaison offices for services rendered in India. It is claimed that no income accrues or arises or deemed to accrue or arise, directly or indirectly, through or from any source in India from liaison offices within the meaning of Section 5 or Section 9 of the Income Tax Act, 1961 (for short, "the 1961 Act"). According to the respondent, the remittance services are offered by the respondent to Non-Resident Indians (for short, "NRIs") in UAE. The contract pursuant to which the funds are handed over by the NRI to the respondent in UAE, is entered between the respondent and the NRI remitter in UAE. The funds are collected from the NRI remitter by the respondent in UAE by charging one-time fee of Dirhams 15. After collecting the funds from the NRI remitter, the respondent makes an electronic remittance of the funds on behalf of its NRI customer in two ways:-

> (i) by telegraphic transfer through bank channels; or
>
> (ii) On the request of the NRI remitter, the respondent sends instruments/cheques through its liaison offices to the beneficiaries in India, designated by the NRI remitter.

The dispute arises in respect of the second mode of remittance through the liaison offices in India. That is on account of the activity undertaken in the liaison office in India of downloading the particulars of remittances through electronic media and printing cheques/drafts drawn on the banks in India, which, in turn, are couriered or dispatched to the beneficiaries in India, in accordance with the instructions of the NRI remitter. While doing this, the liaison office of the respondent remains connected with its main server in UAE, as the information is contained in the main server thereat, which could be accessed by the liaison office in India for the purpose of remittance of funds to the beneficiaries in India by the NRI remitters.

3. It is stated that, in compliance with Section 139 of the 1961 Act, the respondent had been filing its returns of income, since the assessment year 1998-1999 until 2003-2004, showing NIL income, as according to the respondent, no income had accrued or deemed to have accrued to it in India, both under the 1961 Act, as well as, the agreement entered into between the Government of the Republic of India and the Government of the UAE, which is known as Double Taxation Avoidance Agreement (for short, "DTAA"). This agreement (DTAA) has been entered into between the two sovereign countries in exercise of powers under Section 90 of the 1961 Act, for the purpose of avoidance of double taxation and prevention of fiscal evasion, with respect to taxes and income on capital. The DTAA has been notified vide notification No. GSR No. 710(E) dated 18.11.1993. As noted earlier, returns were filed on regular basis by the respondent, which were accepted by the Department without any demur. However, as some doubt was entertained, the respondent filed an application under Section 245Q(1) of the 1961 Act before the Authority for Advance Rulings (Income Tax), New Delhi (for short, "the Authority"), which was numbered as AAR No. 608/2003 and sought ruling of the Authority on the following question: -

> "Whether any income is accrued/deemed to be accrued in India from the activities carried out by the Company in India?" The Authority, vide its ruling dated 26.5.2004 answered the question in the affirmative, namely, "Income shall be deemed to accrue

in India from the activity carried out by the liaison offices of the applicant in India." For so holding, the Authority opined that in view of the deeming provision in Sections 2(24), 4 and 5 read with Section 9 of the 1961 Act, the respondent-assessee would be liable to pay tax under the 1961 Act, as it had carried on business in India through a "permanent establishment" (for short, "PE") situated in India and the profits of the enterprise needed to be taxed in India, but only so much of that, as is attributable to the liaison offices in India (PE). The Authority, amongst others, first examined the facts of the case to ascertain as to whether any income accrues/arises or is deemed to accrue/arise to the respondent in India under Sections 2(24), 5(2) and 9(1)(i) of the 1961 Act. It noted that the business of the respondent was being carried on in UAE; a contract for remitting the amounts is entered into with NRIs and is executed outside India; and even the commission for remitting the amounts is also earned by the respondent outside India, therefore, ostensibly no income accrues/arises, or is deemed to accrue or arise in India. It then adverted to explanation to Section 9(1)(i) and observed that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or from any property in India, or through any assets or source of income in India or through transfer of capital assets situate in India, shall be deemed to accrue in India. It went on to observe that in the present case, it was evident that all the operations of the business of the respondent were not carried out in India. In such a situation, to attract the provisions referred to above, it must be shown that – (i) the applicant has 'business connections' in India; and (ii) the income of the business can be deemed to accrue or arise in India from such operations, as are carried out in India. After analysing this aspect and explanation 2 to Section 9(1)(i) inserted by the Finance Act, 2003, it noted the decision of this Court in Commissioner of Income Tax, Punjab vs. R.D. Aggarwal & Company & Anr.1 and culled out the essential features of expression "business connection" as follows:-

"10. In the light of above discussion, the essential features of "business connection" may be summed up as follows: -

(a) a real and intimate relation must exist between the trading activities by a non-resident carried on outside India and the activities within India:

(b) the relation contributes directly or indirectly to the earning of income by the non-resident in his business;

(c) a course of dealing or continuity of relationship and not a mere isolated or stray nexus between the business of the non-resident outside India and the activity in India, would furnish a strong indication of business connection." It then observed in paragraph 11 of the ruling, as follows: -

"11. Admittedly, the applicant is having liaison offices in India. They attend to the complaints of the clients in cases where remittances are sent directly to banks in

India UAE. In addition, in cases where the applicant has to remit the amounts to the beneficiaries in India, as per the directions of the NRIs, the liaison offices down load the information from the internet, print cheques/drafts in the name of the beneficiaries in India send them through couriers to various places in India. Without the latter activity, the transaction of remittance of the amounts in terms of the contract with the NRIs would not be complete. The commission which the applicant receives for remitting the amount covers not only the business activities carried on AIR 1965 SC 1526 in UAE but also the activity of remittance of the amount to the beneficiary in India by cheques/drafts through courier which is being attend to by the liaison offices. There is, therefore, a real relation between the business carried on by the applicant for which it receives commission in UAE and the activities of, the liaison offices, downloading of information, printing and preparation of cheques/drafts and sending the same to the beneficiaries in India, which contributes directly or indirectly to the earning of the income by the applicant by way of commission. There is also continuity between the business of the applicant in UAE and the activities carried on by the liaison offices. Therefore, it follows that income shall be deemed to accrue/arise to the applicant in UAE from 'business connection' in India. However, the deemed accrual of income to the applicant from the business connection in India in view the Explanation (I) would be only such part of the income as is reasonably attributable to the operations which are carried out in India……." The Authority also took note of Articles 5 and 7 of DTAA and then noted in paragraph 14 as follows: -

"……The moot question is whether the exclusionary clause

(e) of para 3 is attracted; if so, whether the liaison offices would stand excluded from the meaning of the expression 'permanent establishment'. Clause (e) of para 3 says that the expression 'permanent establishment' shall be deemed not to include the maintaining of a fixed place of business solely for the purpose of carrying on for an enterprise any other activity of a preparatory or auxiliary character, Mr. Ranina placed before us extracts from various dictionaries to show the meaning of the word 'auxiliary'. It is unnecessary to refer to them here. Suffice it to say that the word 'auxiliary' in common English usage means helping, assisting or supporting the main activity. We have, therefore, to ascertain whether the activities carried on in the liaison offices in India, are only supportive of the main business or form one of the main functions of the business. The applicant enters into a contract with a NRI to remit to the nominated banks or the nominated beneficiaries in India the amount which is the Indian rupee equivalent of foreign currency handed over to it. It is true that the contract is entered into in UAE and the amount to be remitted as well as the commission is also received in UAE. The contract is, therefore executed in UAE. To fulfill its obligation under the contract the applicant remits the amount in either of the following two modes:

By establishment in UAE –

(i) by telegraphic instructions from Abu Dhabi through banking channels or by liaison offices in India-

(ii) by dispatching through courier the instruments of cheques/drafts prepared by liaison offices to the beneficiaries at various places in India.

In so far as the first mode is concerned, the amount is remitted telegraphically by transferring directly from UAE through bank channel to various places in India and in such remittances the liaison offices have no role to play except attending to the complaints, if any, in India regarding the remittances in cases of fraud etc. This is undoubtedly a work of auxiliary character. However, where is undoubtedly a work of auxiliary character. However, where the applicant adopts the second mode for remitting the amounts in India -an activity approved by the RBI – the liaison offices of the applicant play an important role. They down load the data from internet with regard to the amount to be remitted, the names and addresses of the beneficiaries and then print cheques/drafts and dispatch them to the addresses of the beneficiaries in India through courier. The role of liaison offices in remitting the amounts by adopting the second mode, is nothing short of performing the contract of remitting the amounts at least in part. This case presents a good example of an auxiliary activity to the main activities and an essential activity in performance of contractual obligation. Whereas in the first mode, the activity undertaken by the liaison offices in India may be said to be auxiliary in character, the same cannot be said of the second mode. Down loading the data, preparing cheques for remitting the amount, dispatching the same through courier by the liaison offices is an important part of the main work itself because without remitting the amount to the beneficiaries as desired by the NRIs, performance of the contract will not be complete. So the activities of the liaison offices in the second mode remittance, cannot be said to be work of auxiliary character. It is indeed a significant part of the main work of UAE establishment. It follows that the liaison offices of the applicant in India for the purposes of the second mode of remittance of amount would be a 'permanent establishment' within the meaning of the expression in DTAA." The Authority accordingly concluded that so much of the profits as shall be deemed to accrue or arise to the respondent in India, which were attributable to the PE, namely, the liaison offices in India, would be taxable in India even under the DTAA, and answered the question affirmatively against the respondent- assessee.

4. Following the impugned ruling of the Authority, dated 26.5.2004, the Department issued four notices of even date i.e. 19.7.2004 under Section 148 of the 1961 Act addressed to the respondent pertaining to assessment years 2000-2001, 2001- 2002, 2002-2003 and 2003-2004 respectively. The respondent, therefore, carried the matter before the High Court of Delhi at New Delhi (for short, "the High Court") by way of Writ Petition No. 14869/2004, inter alia, for quashing of the ruling of the Authority dated 26.5.2004, quashing of stated notices and for a direction to the appellants not to tax the respondent in India because no income had accrued to it or is deemed to have accrued to it in India from its activities of liaison offices in India. The High Court, after adverting to indisputable facts, noted that the Authority committed manifest error in appreciating the relevant facts and materials on record and more particularly, misread the purport of Section 90 of the 1961 Act and the settled legal position that the DTAA ought to override the provisions of the Act (the 1961 Act). In other words, the tax liability of the respondent was required to be assessed on

the basis of the provisions in the stated treaty, namely, DTAA. The High Court adverted to the exposition in Union of India & Anr. vs. Azadi Bachao Andolan & Anr.2 in paragraphs 28 and 29 and then observed as follows: -

> "11.2 In the present case, the liability to tax under the DTAA is governed by Article 7. Sub-section (1) of Article 7 of the DTAA categorically provides that profits of an enterprise of a contracting State shall be taxable only in that State, unless the enterprise carries on business, in the other State, through a permanent establishment situated thereof. 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 that, as is attributable to the permanent establishment. Therefore, the liability on account of tax, of an enterprise of either of the contracting State, in India, would arise if the enterprise in issue, i.e., the petitioner, had a permanent establishment in India. The provisions of Section 5(2) (b) and Section 9(1)(1) of the Act would have, in our view, no applicability. Discussion with respect to the 'business connection' in the impugned ruling was, in our view, unnecessary. The Authority had to determine only whether the petitioner carried on business in India through a permanent establishment. For this purpose it was required to examine the definition of permanent establishment as contained in Article 5 of DTAA read with Article 5(3)(e). There is no dispute raised by the petitioner that it maintains liaison offices in India and hence, would fall within the definition of permanent establishment in accordance with the provisions of Article 5(2)(c). The petitioner, however, has contended both before the Authority and before us that it falls within the exclusionary clause contained in Article 5(3)(e) in as much as the activity carried on by the liaison offices in India, has an 'auxiliary' character. On this aspect of the matter the discussion and reasoning by the Authority is contained in (2004) 10 SCC 1 paragraphs 12 to 15 of the impugned ruling. The Authority came to the conclusion that the activity carried on by the liaison offices in India did not have an 'auxiliary' character in terms of Article 5(3)(e) of the Act as the option of remitting of funds through the liaison offices in India was exercised by the NRI remitter which was "nothing short of, as in the words of the parties, performing contract of remitting the amounts". The Authority, thus, held that while, in respect of all remittances of funds by telegraphic transfer through banking channels, the role of the liaison offices in India of an 'auxiliary' character, the same was not true in respect of remittance of funds through liaison offices in India. This was based on the reasoning that without remittances of funds to the beneficiaries in India performance under the contract would not have been complete and thus, the downloading of data, preparation of cheques for remitting the amount, dispatching the same through courier by the liaison offices, constituted an important part of the main work, which was, remitting the amount to the beneficiaries as desired by the NRIs. Based on this reasoning, the Authority came to the conclusion that the work of the liaison offices in India, being a significant part of the main work of UAE establishment, the liaison office of the petitioner, in India, would constitute a 'permanent establishment' within the provisions of the DTAA." And again, whilst analysing the scope of Articles 5 and 7 of the DTAA in paragraph 12 of the impugned judgment, the High Court noted thus: -

"12.....In the case of DTAA under consideration in the present case under Article 5 read with Article 7, profits of an enterprise are liable to tax in India if an enterprise were to carry on business through permanent establishment, meaning thereby fixed place of business through which business of an enterprise is wholly or partly carried on. Under Article 5(2)(c), amongst others, permanent establishment includes an office. However, Article 5(3) which opens with a non-obstante clause, is illustrative of instances where-under the DTAA various activities have been deemed as ones which would not fall within the ambit of the expression 'permanent establishment'. One such exclusionary clause is found in Article 5(3)(e) which is: maintenance of fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character. The plain meaning of the word 'auxiliary' is found in Black's Law Dictionary 7th Edition at page 130 which reads as "aiding or supporting, subsidiary". The only activity of the liaison offices in India is simply to download information which is contained in the main servers located in UAE based on which cheques are drawn on banks in India whereupon the said cheques are couriered or dispatched to the beneficiaries in India, keeping in mind the instructions of the NRI remitter. Can such an activity be anything but auxiliary in character. Plainly to our minds, the instant activity is in 'aid' or 'support' of the main activity. The error into which, according to us, the Authority has fallen is in reading Article 5(3)(e) as a clause which permits making a value judgment as to whether the transaction would or would not have been complete till the role played by liaison offices in India was fulfilled as represented by the petitioner to their NRI remitter. According to us, what has been lost sight of, is that, by invoking the clause with regard to permanent establishment, we would, by a deeming fiction tax an income which otherwise neither arose nor accrued in India – when looked at from this point of view, the exclusionary clause contained in Article 5(3) and in this case in particular, sub-clause (e) have to be given a wider and liberal play. Once an activity is construed as being subsidiary or in aid or support of the main activity it would, according to us, fall within the exclusionary clause. To say that a particular activity was necessary for completion of the contract is, in a sense saying the obvious as every other activity which an enterprise undertakes in earning profits is with the ultimate view of giving effect to the obligations undertaken by an enterprise vis-a-vis its customer. If looked at from that point of view, then, no activity could be construed as preparatory or of an 'auxiliary' character. On this aspect of the matter, the Supreme Court in the case of DIT (International Taxation) vs. Morgan Stanley & Co; 2007(7) SCC 1 amongst other issues was called upon to decide as to whether back office operations carried on by Morgan Stanley Company for one of its Morgan Stanley Advantages Services Pvt. Ltd would qualify as having a permanent establishment in India. The Supreme Court, while holding that back office operations fall within the exclusionary clause Article 5(3)(e) of Indo-US Double Taxation DTAA, which is, identical to DTAA under consideration in the present case, came to the conclusion that back office operations came within the purview of Article 5(3)(e). It is laid down by the Supreme Court in the case of Morgan Stanley (supra) that in ascertaining what would constitute a 'permanent establishment' within the meaning of Article 5(1) of

the Indo-US DTAA, one had to undertake what is called a functional and factual analysis of each of the activities undertaken by an establishment. In that case the Supreme Court came to the conclusion that the entity located in India which was engaged in only supporting the front office functions of Morgan Stanley & Co., a non-resident, in fixed income and equity research and information technology enabled services such as data processing support centre, technical services and reconciliation of accounts being back office operators would not fall with Article 5(1) of the Indo-US DTAA." Accordingly, the High Court was of the opinion that the Authority proceeded on a wrong premise by first examining the efficacy of Section 5(2)(b) and Section 9(1)(i) of the 1961 Act instead of applying the provisions in Articles 5 and 7 of the DTAA for ascertaining the respondent's liability to tax. Further, the nature of activities carried on by the respondent-assessee in the liaison offices being only of preparatory and auxiliary character, were clearly excluded by virtue of deeming provision. The High Court distinguished the decisions relied upon by the Authority in Anglo-

French Textile Co. Ltd., by Agents, M/s. Best & Company Ltd., Madras vs. Commissioner of Income Tax, Madras3 and R.D. Aggarwal & Company (supra). Inasmuch as, the ratio in these decisions, according to the High Court, was that the non-resident entity could be taxed only if there was business connection AIR 1953 SC 105 between the business carried on by a non-resident which yields profits or gains and some activity in the taxable territory which contributes directly or indirectly to the earning of those profits or gains. The High Court then concluded that the activity carried on by the liaison offices of the respondent in India did not in any manner contribute directly or indirectly to the earning of profits or gains by the respondent in UAE and more so, every aspect of the transaction was concluded in UAE, whereas, the activity performed by the liaison offices in India was only supportive of the transaction carried on in UAE. The High Court also took note of explanation 2 to Section 9(1)(i) and observed that the same reinforces the fact that in order to have a business connection, in respect of a business activity carried on by non-resident through a person situated in India, it should involve more than what is supportive or subsidiary to the main function referred to in clauses

(a) to (c). The High Court eventually quashed the impugned ruling of the Authority and also the notices issued by the Department under Section 148 of the 1961 Act, since the notices were based on the ruling which was being set aside. The High Court, however, gave liberty to the appellants to proceed against the respondent on any other ground, as may be permissible in law.

5. Feeling aggrieved, the Department has assailed the decision of the High Court by way of the present appeal arising from SLP(C) No. 31276/2011.

6. We have heard Mr. Arijit Prasad, learned senior counsel for the appellants and Mr. H.P. Ranina, learned counsel for the respondent.

7. Both sides have more or less reiterated the stand taken before the Authority and the High Court. After cogitating over the rival submissions and the opinion recorded by the Authority and the High Court, the core issue that needs to be answered in this appeal is: whether the stated activities of the respondent-assessee would qualify the expression "of preparatory or auxiliary character"? Having regard to the nature of activities carried on by the respondent-assessee, as held by the Authority, it would appear that the respondent was engaged in "business" and had "business connections", for which, by virtue of deeming provision and the sweep of Sections 2(24), 4 and 5 read with Section 9 of the 1961 Act including the exposition in Anglo-French Textile Co. Ltd. (supra) and R.D. Aggarwal & Company (supra), it would be a case of income deemed to accrue or arise in India to the respondent.

8. However, in the present case, the matter in issue will have to be answered on the basis of the stipulations in DTAA notified in exercise of powers conferred under Section 90 of the 1961 Act. This position is no more res integra in view of the dictum in Azadi Bachao Andolan (supra). The efficacy of Section 90 of the 1961 Act has been delineated by this Court after adverting to the decisions in Commissioner of Income Tax, AP-I vs. Vishakhapatnam Port Trust4, Commissioner of Income Tax vs. Davy Ashmore India Ltd.5, Leonhardt Andra Und Partner, GmbH vs. Commissioner of Income Tax6, Commissioner of Income Tax vs. R.M. Muthaiah7 and Arabian Express Line Ltd. of United Kingdom & Ors. vs. Union of India8, whereafter the Court went on to observe in paragraph 28, as follows: -

> "28. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income (1983) 144 ITR 146 (AP) (1991) 190 ITR 626 (Cal) (2001) 249 ITR 418 (Cal) (1993) 202 ITR 508 (Kant) (1995) 212 ITR 31 (Guj) under Section 5 of the Act, then there was no purpose of making those sections "subject to the provisions of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of DTACs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC." (emphasis supplied) In view of this exposition, which squarely applies to the fact situation of the present case, we must answer the question under consideration in light of the purport of provisions in DTAA, which has been executed by the Government of India and the Government of UAE, and has come into force consequent to publication vide notification dated 18.11.1993. The recitals of the said notification read thus: -

"Income-tax Act, 1961:Notification under section 90: Agreement Between the Government of the Republic of India and the Government of the United Arab Emirates for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital Notification G.S.R. No. 710(E), dated 18th November, Whereas the annexed agreement between the Government of the United Arab Emirates and the Government of the Republic of India for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital has entered into force on the 22nd September, 1993, after the notification by both the Contracting States to each other of the completion of the proceedings required by laws for bringing into force of the said agreement in accordance with paragraph 1 of Article 30 of the said Agreement:

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), section 24A of the Companies (Profits) Surtax Act, 1964 (7 of 1964), and section 44A of the Wealth-tax Act, 1957 (27 of 1957), the Central Government hereby directs that all the provisions of the said agreement shall be given effect to in the Union of India.

ANNEXURE AN AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE GOVERNMENT OF THE UNITED ARAB EMIRATES FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL.

The Government of the Republic of India and the Government of the United Arab Emirates Desiring to promote mutual economic relations by concluding an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital.

Have agreed as follows:" Article 1 of the DTAA bears title "Personal Scope" predicating that the agreement shall apply to persons who are residents of one or both of the contracting States. Article 2 deals with "Taxes Covered", to which the agreement would apply. Article 2 reads thus: -

"Article 2 TAXES COVERED

1. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income of capital including taxes on gains from alienation of movable or immovable property as well as on capital appreciation.

2. The existing taxes to which the Agreement shall apply are:

(a) In United Arab Emirates:

(i) Income-tax;
(ii) Corporation tax;
(iii) Wealth-tax

(hereinafter referred to as “U.A.E. tax”);

(b) In India:

(i) the income-tax including any surcharge thereon;

(ii) the surtax; and

(iii) the wealth-tax (hereinafter referred to as “Indian tax”).

3. This Agreement shall also apply to any identical or substantially similar taxes on income or capital which are imposed at Federal or State level by either Contracting State in addition to, or in place of, the taxes referred to in paragraph 2 of this Article. The competent authorities of the Contracting States shall notify each other of any substantial changes which are made in their respective taxation laws.” Article 3 refers to General Definitions and the meaning of the concerned expression contained in the agreement, unless the context otherwise requires. Article 4 pertains to “Resident of the Contracting State”. The other Articles which may have bearing on the question posed before us are Articles 5 and 7, dealing with “Permanent Establishment (PE)” and “Business Profits” respectively, which read thus: -

“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 to more than 9 months within any twelve-month period.

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

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

b. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery; c. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d. the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise; e. the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.

4. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of independent status to whom paragraph 5 applies - is acting on behalf of an enterprise and has, and habitually exercises in a Contracting State an authority to conclude contracts on behalf of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such persons are limited to the purchase of goods or merchandise for the enterprise.

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

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.

4. In so far as it has been customary in a Contracting 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 the 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." Keeping in view the finding recorded by the High Court, we may proceed on the basis that the respondent-assessee had a fixed place of business through which the business of the respondent was being wholly or partly carried on. That, however, would not be conclusive until a further finding is recorded that the respondent had a PE situated in India, so as to attract Article 7 dealing with business profits to become taxable in India, to the extent attributable to the PE of the respondent in India. For that, we may have to revert back to Article 5, which deals with and defines the "Permanent Establishment (PE)". A fixed place of business through which the business of an enterprise is wholly or partly carried on is regarded as a PE. The term "Permanent Establishment (PE)" would include the specified places referred to in clause 2 of Article 5. It is not in dispute that the place from where the activities are carried on by the respondent in India is a liaison office and would, therefore, be covered by the term PE in Article 5(2). However, Article 5(3) of the DTAA opens with a non- obstante clause and also contains a deeming provision. It predicates that

notwithstanding the preceding provisions of the concerned Article, which would mean clauses 1 and 2 of Article 5, it would still not be a PE, if any of the clauses in Article 5(3) are applicable. For that, the functional test regarding the activity in question would be essential. The High Court has opined that the respondent was carrying on stated activities in the fixed place of business in India of a preparatory or auxiliary character. Indeed, the expression "business" has been defined in the 1961 Act, as follows: -

> "2. Definitions.- In this Act, unless the context otherwise requires,-
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> xxx xxx xxx (13) "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture;" The expression "business connection" can be discerned from Section 9(1), as also, the meaning of expression "business activity".

We will advert to those provisions a little later and for the time being, assume that the stated activities of the respondent are business activities. However, since the stated activities of the liaison offices of the respondent in India are of preparatory or auxiliary character, the same would fall within the excepted category under Article 5(3)(e) of the DTAA. Resultantly, it cannot be regarded as a PE within the sweep of Article 7 of DTAA. The expression "preparatory" is not defined in the 1961 Act or the DTAA. The dictionary meaning of that expression can be traced to term "preparatory work" and "travaux préparatoires", which in the Black's Law Dictionary (Eleventh Edition), read thus:-

> "preparatory work. See TRAVAUX PRÉPARATOIRES.
>
> travaux préparatoires. Materials used in preparing the ultimate form of an agreement or statute, and esp. of an international treaty; the draft or legislative history of a treaty." The expression "auxiliary" is also not defined in the 1961 Act or the DTAA. In common parlance, the meaning of that expression is predicated in Concise Oxford English Dictionary (Twelfth Edition), which reads thus: -
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> "Auxiliary- adj. providing additional help or support. n. an auxiliary person or thing. N. Amer. A group of volunteers who assist a church, hospital, etc. with charitable activities." In Black's Law Dictionary (Eleventh Edition), the term "auxiliary" is defined as follows: -
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> "Auxiliary adj. 1. Aiding or supporting. 2. Subsidiary.
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> 3. Supplementary." The crucial activities in the present case are of downloading particulars of remittances through electronic media and then printing cheques/drafts drawn on the banks in India, which, in turn, are couriered or dispatched to the beneficiaries in India, in accordance with the instructions of the NRI remitter. While doing so, the liaison office of the respondent in India remains connected with its main server in UAE and the information residing thereat is accessed by the liaison

> office in India for the purpose of remittance of funds to the beneficiaries in India by the NRI remitters. These are combination of virtual and physical activities unlike the virtual activity of funds being remitted by telegraphic transfer through banking channels. As regards the latter, it is not the case of the Department that the same would be covered and amenable to tax liability by virtue of deeming provision in the 1961 Act.
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> 9. While answering the question as to whether the activity in question can be termed as other than that "of preparatory or auxiliary character", we need to keep in mind the limited permission given by the RBI to the respondent under Section 29(1)(a) of the 1973 Act, on 24.9.1996. From paragraph 2 of the stated permission, it is evident that the RBI had agreed for establishing a liaison office of the respondent at Cochin, initially for a period of three years to enable the respondent to (i) respond quickly and economically to enquiries from correspondent banks with regard to suspected fraudulent drafts; (ii) undertake reconciliation of bank accounts held in India; (iii) act as a communication centre receiving computer (via modem) advices of mail transfer T.T. stop payments messages, payment details etc., originating from respondent's several branches in UAE and transmitting to its Indian correspondent banks; (iv) printing Indian Rupee drafts with facsimile signature from the Head Office and counter signature by the authorised signatory of the Office at Cochin; and (v) following up with the Indian correspondent banks.

These are the limited activities which the respondent has been permitted to carry on within India. This permission does not allow the respondent-assessee to enter into a contract with anyone in India, but only to provide service of delivery of cheques/drafts drawn on the banks in India. Notably, the permitted activities are required to be carried out by the respondent subject to conditions specified in clause 3 of the permission, which includes not to render any consultancy or any other service, directly or indirectly, with or without any consideration and further that the liaison office in India shall not borrow or lend any money from or to any person in India without prior permission of RBI. The conditions make it amply clear that the office in India will not undertake any other activity of trading, commercial or industrial, nor shall it enter into any business contracts in its own name without prior permission of the RBI. The liaison office of the respondent in India cannot even charge commission/fee or receive any remuneration or income in respect of the activities undertaken by the liaison office in India. From the onerous stipulations specified by the RBI, it could be safely concluded, as opined by the High Court, that the activities in question of the liaison office(s) of the respondent in India are circumscribed by the permission given by the RBI and are in the nature of preparatory or auxiliary character. That finding reached by the High Court is unexceptionable.

10. The High Court had justly adverted to the exposition of this Court in DIT (International Taxation), Mumbai vs. Morgan Stanley & Co. Inc.9, which dealt with the case of an assessee having set up office in India to support the main office functions in fixed income and equity research and in providing IT enabled services such as back office operations, data processing and support centres to the entity in United States. This Court, in paragraphs 10 to 14, observed thus: -

> "10. In our view, the second requirement of Article 5(1) of DTAA is not satisfied as regards back office functions. We have examined the terms of the Agreement along with the advance ruling application made by MSCo inviting AAR to give its ruling. It is clear from reading of the above Agreement/application that MSAS in India would be engaged in supporting the front office functions of MSCo in fixed income and equity research and in providing IT enabled services such as data processing support centre and technical services as also reconciliation of accounts. In order to decide whether a PE stood constituted one has to undertake what is called as a functional and factual analysis of each of the activities to be undertaken by an establishment. It is from that point of view, we are in agreement with the ruling of AAR that in the present case Article 5(1) is not applicable as the said MSAS would be performing in India only back office operations. Therefore to the extent of the above back office functions the second part of Article 5(1) is not attracted.

11. Lastly, as rightly held by AAR there is no agency PE as the PE in India had no authority to enter into or conclude the contracts. The contracts would be entered into in the United States. They would be concluded in US. The implementation of those contracts only to the extent of back office functions would be carried out in India, and therefore, MSAS would not constitute an agency PE as contended on behalf of the Department.

12. In DTAA, the term PE means a fixed place of business through which the business of an MNE is wholly or partly carried out. The definition of the word PE in Section 92-F(iii) is inclusive, however, it is not under Article (2007) 7 SCC 1 5(1) of the Treaty. It is for this reason that Article 5(2) of DTAA herein refers to places included as PE of the MNE. One such place is mentioned in Article 5(2)(l) which deals with furnishing of services.

13. The concept of PE was introduced in the 1961 Act as part of the statutory provisions of transfer pricing by the Finance Act of 2001. In Section 92-F(iii) the word "enterprise" is defined to mean "a person (including a permanent establishment of such person) who is, or has been, or is proposed to be, engaged in any activity, relating to the production, ..." Under CBDT Circular No. 14 of 2001 it has been clarified that the term PE has not been defined in the Act but its meaning may be understood with reference to DTAA entered into by India. Thus the intention was to rely on the concept and definition of PE in DTAA. However, vide the Finance Act, 2002 the definition of PE was inserted in the Income Tax Act, 1961 (for short "the IT Act") vide Section 92-F(iii-a) which states that the PE shall include a fixed place of business through which the business of MNE is wholly or partly carried on. This is where the difference lies between the definition of the word PE in the inclusive sense under the IT Act as against the definition of the word PE in the exhaustive sense under DTAA. This analysis is important because it indicates the intention of Parliament in adopting an inclusive definition of PE so as to cover service PE, agency PE, software PE, construction PE, etc.

14. There is one more aspect which needs to be discussed, namely, exclusion of PE under Article 5(3). Under Article 5(3)(e) activities which are preparatory or auxiliary in character which are carried out at a fixed place of business will not constitute a PE. Article 5(3) commences with a non obstante clause. It states that notwithstanding what is stated in Article 5(1) or under Article 5(2) the

term PE shall not include maintenance of a fixed place of business solely for advertisement, scientific research or for activities which are preparatory or auxiliary in character. In the present case we are of the view that the abovementioned back office functions proposed to be performed by MSAS in India falls under Article 5(3)(e) of DTAA. Therefore, in our view in the present case MSAS would not constitute a fixed place PE under Article 5(1) of DTAA as regards its back office operations." (emphasis supplied) Learned counsel for the appellant, however, attempted to distinguish this judgment on the argument that this case dealt with the issue of service PE. According to him, the Court must examine the full transactions of the respondent to determine whether the work done by the respondent-assessee was one of a backup office work or auxiliary work. Insofar as the nature of activities carried on by the respondent through the liaison office in India, as permitted by the RBI, we have upheld the conclusion of the High Court that the same were in the nature of "preparatory or auxiliary character" and, therefore, covered by Article 5(3)(e). As a result, the fixed place used by the respondent as liaison office in India, would not qualify the definition of PE in terms of Articles 5(1) and 5(2) of the DTAA on account of non-obstante and deeming clause in Article 5(3) of the DTAA.

11. Having said thus, it must follow that the respondent was not carrying on any business activity in India as such, but only dispensing with the remittances by downloading information from the main server of respondent in UAE and printing cheques/drafts drawn on the banks in India as per the instructions given by the NRI remitters in UAE. The transaction(s) had completed with the remitters in UAE, and no charges towards fee/commission could be collected by the liaison office in India in that regard. To put it differently, no income as specified in Section 2(24) of the 1961 Act is earned by the liaison office in India and moreso because, the liaison office is not a PE in terms of Article 5 of DTAA (as it is only carrying on activity of a preparatory or auxiliary character). The concomitant is - no tax can be levied or collected from the liaison office of the respondent in India in respect of the primary business activities consummated by the respondent in UAE. The activities carried on by the liaison office of the respondent in India as permitted by the RBI, clearly demonstrate that the respondent must steer away from engaging in any primary business activity and in establishing business connection as such. It can carry on activities of preparatory or auxiliary nature only. In that case, the deeming provisions in Sections 5 and 9 of the 1961 Act can have no bearing whatsoever.

12. Our attention was invited to the dictum in Assistant Director of Income Tax-1, New Delhi vs. E-Funds IT Solution Inc.10. Paragraph 2 of the said decision would clearly indicate the background in which the issue was answered by this Court. The same reads thus: -

> (2018) 13 SCC 294 "2. The assessing authority decided that the assessees had a permanent establishment (hereinafter referred to as "PE") as they had a fixed place where they carried on their own business in Delhi, and that, consequently, Article 5 of the India US Double Taxation Avoidance Agreement of 1990 (hereinafter referred to as "DTAA") was attracted.

Consequently, the assessees were liable to pay tax in respect of what they earned from the aforesaid fixed place PE in India. The CIT (Appeals) dismissed the appeals of the assessees holding that

Article 5 was attracted, not only because there was a fixed place where the assessees carried on their business, but also because they were "service PEs" and "agency PEs" under Article 5. In an appeal to the ITAT, the ITAT held that the CIT (Appeals) was right in holding that a "fixed place PE" and "service PE" had been made out under Article 5, but said nothing about the "agency PE" as that was not argued by the Revenue before the ITAT. However, the ITAT, on a calculation formula different from that of the CIT (Appeals), arrived at a nil figure of income for all the relevant assessment years. The appeal of the assessees to the High Court proved successful and the High Court, by an elaborate judgment, has set aside the findings of all the authorities referred to above, and further dismissed the cross-appeals of the Revenue. Consequently, the Revenue is before us in these appeals." The Court, after analysing the decisions and the concerned report produced before it, observed in paragraph 22 as follows: -

> "22. This report would show that no part of the main business and revenue earning activity of the two American companies is carried on through a fixed business place in India which has been put at their disposal. It is clear from the above that the Indian company only renders support services which enable the assessees in turn to render services to their clients abroad. This outsourcing of work to India would not give rise to a fixed place PE and the High Court judgment is, therefore, correct on this score." (emphasis supplied) We may usefully refer to paragraphs 24 and 26 of the reported decision, which read thus: -
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> "24. It has already been seen that none of the customers of the assessees are located in India or have received any services in India. This being the case, it is clear that the very first ingredient contained in Article 5(2)(l) is not satisfied. However, the learned Attorney General, relying upon Para 42.31 of the OECD Commentary, has argued that services have to be furnished within India, which does not mean that they have to be furnished to customers in India. Para 42.31 of the OECD Commentary reads as under:
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> "42.31. ... Whether or not the relevant services are furnished to a resident of a State does not matter; what matters is that the services are performed in the State through an individual present in that State." xxx xxx xxx
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> 26. We entirely agree with the approach of the High Court in this regard. Para 42.31 of the OECD Commentary does not mean that services need not be rendered by the foreign assessees in India. If any customer is rendered a service in India, whether resident in India or outside India, a "service PE" would be established in India. As has been noticed by us hereinabove, no customer, resident or otherwise, receives any service in India from the assessees. All its customers receive services only in locations outside India. Only auxiliary operations that facilitate such services are carried out in India. This being so, it is not necessary to advert to the other ground, namely, that "other personnel" would cover personnel employed by the Indian company as well, and that the US companies through such personnel are furnishing services in India. This being the case, it is clear that as the very first part of Article 5(2)(l) is not

attracted, the question of going to any other part of the said article does not arise. It is perhaps for this reason that the assessing officer did not give any finding on this score." (emphasis supplied) As aforesaid, we agree with the finding recorded by the High Court about the nature and character of stated activities carried on by the liaison offices of the respondent and in our view, the High Court justly reckoned the same as being of preparatory or auxiliary character, falling under Article 5(3)(e).

13. The High Court has also examined the matter in the context of explanation to Section 9(1)(i) of the 1961 Act. Prior to enactment of Finance Act, 2003 (32 of 2003), Section 9(1)(i) read thus: -

"Income deemed to accrue or arise in India.

9. (1) The following incomes shall be deemed to accrue or arise in India: -

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Explanation.— For the purposes of this clause—

(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;

(c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India;

(d) in the case of a non-resident, being—
(1) an individual who is not a citizen of India; or

(2) a firm which does not have any partner who is a citizen of India or who is resident in India; or
(3) a company which does not have any shareholder who is a citizen of India or

who is resident in India,
no income shall be deemed to accrue or
arise in India to such individual, firm or
company through or from
operations which are confined to the
shooting of any cinematograph film in
India.
……..”

After the enactment of Finance Act, 2003, explanation 2 came to be inserted after the renumbered explanation 1 to clause (i) of sub-

Section (1) of Section 9 with effect from 1.4.2004. The same reads thus: -

“Income deemed to accrue or arise in India.

9. (1) The following incomes shall be deemed to accrue or arise in India: -

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Explanation 1.- xxx xxx xxx Explanation 2.– For the removal of doubts, it is hereby declared that “business connection” shall include any business activity carried out through a person who, acting on behalf of the non-resident,-

(a) has and habitually exercises in India, an authority to conclude contact on behalf of the non-

resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(c) habitually secures orders in India, mainly or wholly for the non-resident or that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non- resident:

Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business:

> Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non- resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principle non-resident or are subject to the same common control as the principal non- resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status." The meaning of expressions "business connection" and "business activity" has been articulated. However, even if the stated activity(ies) of the liaison office of the respondent in India is regarded as business activity, as noted earlier, the same being "of preparatory or auxiliary character"; by virtue of Article 5(3)(e) of the DTAA, the fixed place of business (liaison office) of the respondent in India otherwise a PE, is deemed to be expressly excluded from being so. And since by a legal fiction it is deemed not to be a PE of the respondent in India, it is not amenable to tax liability in terms of Article 7 of the DTAA.

14. Taking any view of the matter, therefore, we find no substance in this appeal. We uphold the conclusions reached by the High Court for the reasons stated hitherto.

15. Accordingly, the appeal is dismissed with no order as to costs. Pending interlocutory applications, if any, shall stand disposed of.

.....J. (A.M. Khanwilkar) .....J. (Ajay Rastogi) New Delhi;

April 24, 2020.