2025:DHC:10838-DB

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

% Judgment Reserved on*: 09.10.2025*
Judgment delivered on*: 04.12.2025*
Judgment uploaded on*: As per Digital Signature~*

\+ **ITA 353/2025**
\+ **ITA 354/2025**

COMMISSIONER OF INCOME TAX, INTERNATIONAL TAXATION-1, NEW DELHI .....Appellant

versus

CLIFFORD CHANCE PTE LTD .....Respondent

Advocates who appeared in this case

For the Appellant : Mr. Puneet Rai, SSC, Mr. Ashvini Kr., Mr. Rishabh Nangia, Mr. Gibran, JSC.

For the Respondent : Mr. Ajay Vohra, Senior Advocate with Mr. Adityya Vohra, Mr. Kunal Pandey and Mr. Tanmay, Advocates.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J.

1. The captioned appeals under Section 260A of the Income-Tax Act, 1961 (hereinafter referred to as '*the Act*') have been filed by the Revenue challenging the common order dated 14.03.2024 of the Income-Tax Appellate Tribunal (hereinafter referred to as '*the Tribunal*') in Income Tax

Appeal Nos. 2681/Del/2023 and 3377/Del/2023, whereby the appeals of the assessee have been allowed.

2. I.T.A 354/2025 before us is for the Assessment Year (AY) 2020-21 and I.T.A. 353/2025 is for AY 2021-22.

FACTUAL BACKGROUND

3. At the outset we may provide a brief factual background of the controversy. The respondent/assessee is non-resident company engaged in the business of legal advisory services. The assessee company filed its return of income for the A.Y. 2020-21 on 29.12.2020 and for the A.Y. 2021-22 on 07.03.2022, both declaring '*NIL*' income. Thereafter, the Assessing Officer (AO) passed draft assessment orders dated 30.09.2022 for AY 2020-21 and 29.12.2022 for AY 2021-22, proposing to make additions of ₹15,55,45,693/- and 7,97,64,414/- respectively. Aggrieved by the same, the assessee approached the Dispute Resolution Panel (DRP), which dismissed the objections of the assessee, the AO passed final assessment orders dated 28.07.2023 and 29.10.2023 under Section 143(3) read with Section 144C(13) of the Act and assessed a total income of ₹15,55,45,693/- and ₹7,97,64,414/- for AYs 2020-21 and 2021-22 respectively.

4. Challenging the final assessment orders, the assessee filed appeals before the Tribunal, which deleted the additions made by the assessing officer and allowed the appeals *vide* the impugned order, while stating as under:

> *"12.3 Thus applying the provisions of Article 5(6)(a) to the present case, in our considered view to constitute a service PE actual performance of service in India is essential and*

accordingly only when the services are rendered by the employees within India with their physical presence during the financial year relevant to the AYs under consideration shall be taken into account for computing threshold limit for creation of a service PE of the assessee in India. The Hon'ble Supreme Court in the case of E-funds IT Solutions Inc. (supra) observed that requirement of service PE is that services must be furnished "within India".

12.4 It is an undisputed fact that the employees of the assessee were present in India for total number of 120 days in AY 2020-21 and none of the employees were present in India in AY 2021-22. Out of the total 120 days the vacation period amounted to 36 days which has been substantiated by the assessee by furnishing the relevant evidence thereof. In the case of Linklaters LLP (supra) the Mumbai Tribunal has held that period of holidays has to be excluded while computing the threshold limit for constitution of service PE. Therefore, if the vacation days (36 days) are excluded from the total days for which the employee of the assessee were present in India (Le. 120 days) the same would come to 84 days which is less than the threshold of 90 days provided under Article 5(6)(a) of the India-Singapore DTAA for constitution of service PE of the assessee in India. Further, to arrive at the threshold, the Ld. AO has considered business development days comprising of 35 days as well as common days comprising of 5 days which in our considered view should be excluded while computing the threshold of service PE as no services were provided to customers in India on the days spent on business development activities and the computation of threshold should not be based on man days by aggregating common days spent by more than one individual. In effect, the services have been furnished by the assessee only for 44 days in India after excluding vacation period, Business Development days and common days and accordingly the assessee does not constitute service PE in India as per India-Singapore DTAA during the AY 2020-21.

12.8 In the light of above factual matrix, the arguments put forth by the parties and the judicial precedents relied upon by the Ld. AR, we hold that the assessee does not constitute service

PE/virtual service PE in AY 2020-21 and 2021-22. The receipts of Rs. 15,55,45,693/- by the assessee in AY 2020-21 and Rs. 7,97,64,414/- in AY 2021-22 are in the nature of business profits of the assessee not taxable in India in the absence of the PE of the assessee in India in terms of Article 7 r.w. Article 5(6)(a) of the India Singapore DTAA. Accordingly, ground Nos. 5 to 7.1 in AY 2020-21 and ground No. 6 to 8.1 in AY 2021-22 are allowed."

5. It is against this order that the Revenue has come in appeal before us. On 02.09.2025, we admitted the appeals and formed the following questions of law:

A. Whether on the facts and in the circumstances of the case, and in law, the Tribunal erred in holding that the assessee does not have a service permanent establishment in India?

B. Whether on the facts and in the circumstances of the case, and in law, the Tribunal erred in holding that the assessee does not have a virtual service permanent establishment in India?

SUBMISSIONS OF THE APPELLANT- THE REVENUE

6. Mr. Puneet Rai, learned Senior Standing Counsel for the appellant submitted that the Tribunal erred in holding that the assessee company does not have any service permanent establishment in India.

7. According to him, it is an admitted position that the employees of the assessee company, namely, Mr. Rahul Guptan and Mr. Shashwat Tewary were present in India for 120 days during the Financial Year (FY) 2019-20

i.e., AY 2020-21. However, the Tribunal erred in excluding 36 days from the total of 120 days by treating the same as vacation days. The Tribunal observed that after such exclusion, the number of remaining days would be 84 days for which the employees of the assessee were in India, which is below the threshold limit of 90 days for constitution of permanent establishment as stipulated under Article 5(6)(a) of the India-Singapore Double Taxation Avoidance Agreement (hereinafter referred to as *'the DTAA'*). The Tribunal failed to appreciate that the assessing officer gave a categorical finding that the assessee failed to file reliable documentary evidences necessary to prove that the said employees were on leave for 36 days during AY 2020-21.

8. According to Mr Rai, for the AY 2021-22, although the employees of the assessee were not physically present in India, the Tribunal ought to have appreciated that there is no mention of the word "physical presence" of employees for constitution of permanent establishment under Article 5(6) of the DTAA. It merely states that furnishing of services within the contracting state should continue for 90 days or more. Article 5 (6) of the DTAA reads as under:-

> *"ARTICLE 5*
> *PERMANENT ESTABLISHMENT*
> ……
> *6. An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services, other than services referred to in paragraphs 4 and 5 of this Article and technical services as defined in Article 12, within a Contracting State through employees or other personnel, but only if:*

> *(a) activities of that nature continue within that Contracting State for a period or periods aggregating more than 90 days in any fiscal year; or*
> *(b) activities are performed for a related enterprise (within the meaning of Article 9 of this Agreement) for a period or periods aggregating more than 30 days in any fiscal year."*

9. It is the contention of Mr. Rai that the assessee continued furnishing of services for more than 90 days in the AY 2020-21 as well as AY 2021-22 and therefore the existence of service permanent establishment cannot be denied in the present case. It is the continuance of services for the threshold limit of 90 days that matters and not the physical presence of the employees. Reliance is placed on the decision of the Supreme Court in the case of ***Hyatt International Southwest Asia Ltd. v. ADIT, 2025 SCC OnLine SC 1506***, which though given in the context of fixed place permanent establishment, according to Mr Rai is still relevant to the present case. He has relied upon paragraph 21 of the judgment which reads as under:

> *"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."*

10. In the present case, the employees of the assessee were physically present in India during AY 2017-18, 2018-19, 2019-20 as well as in AY

2020- 21. The assessee has admitted its service permanent establishment in India for AYs 2017-18, 2018-19 and 2019-20. The employees of the assessee were admittedly present in India for 120 days during the AY 2020-21. However as per the assessee, they were on vacation for 36 days. It is submitted that the said period cannot be excluded for the purposes of determining the presence of permanent establishment as the employees of the assessee were continuously furnishing services in India since AY 2017-18.

11. Mr. Rai further submitted that as a result of rapid digitisation, companies can now continue to provide services even without the physical presence of employees in the contracting state. Thus, a virtual service permanent establishment of the assessee company was established in India, making the receipts on account of those services are taxable in India. In this regard, he has drawn our attention to the observations made by High Court of Madras in ***Verizon Communications Singapore Pte Ltd. v. ITO, (2014) 361 ITR 575 (Madras)*** which reads as follows:

> *"101.....In any event, in a virtual world, the physical presence of an entity has today become an insignificant one; the presence of the equipment of the assessee, its rights and the responsibilities of the assessee, visa- vis the customer and the customers' responsibilities clearly show the extent of the virtual presence of the assessee which operates through its equipment placed in the customer's premises through which the customer has access to data on the speed and delivery of the data and voice sent from one end to the other. The Explanations inserted thus clearly point out that the traditional concepts relating to control, possession, location on economic activities and geographic rules of source of income recede to the background and are not of any relevance in considering the question under section 9(l) (vi) read with Explanation 2. Thus, more so when it*

comes to the question of dealing with issues arising on account of more complex situations brought in by technological development by the use of and role of digital information, goods, etc., the foreign enterprise does not need physical presence at all in a country for carrying on business. Hence, we do not think that we need to go in depth in this regard for the reason that we have already given hereinbefore."

12. He also stated that the concept of virtual service permanent establishment was duly recognized by the Bengaluru Bench of the Tribunal in the case of ***ABB FZ-LLC v. DCIT, (2017) 166 ITD 329 (Bang)***. The Tribunal while duly recognising the concept of virtual reality in today's era observed that in the present age of technology, services, information, consultancy, management etc., can be provided through various virtual modes like e-mail, internet, videoconference, remote monitoring, remote access, etc. While categorically rejecting the arguments of the assessee therein regarding the condition of stay of employees in India, it held that for establishing permanent establishment, it is rendition of services that is required and not the presence of employees.

SUBMISSIONS OF THE RESPONDENT- CLIFFORD CHANCE PTE LTD

13. *Per contra*, Mr. Ajay Vohra, learned Senior Counsel for the respondent would submit that the order passed by the Tribunal is justified and legally sound, and does not warrant any interference.

14. He stated that during AY 2020-21, the respondent provided legal advisory to Indian clients, partly rendered remotely from outside India and partly through two of its employees who visited India for rendering such services. Employees of the respondent stayed in India for a total period of

120 days during AY 2020-21. A break-up of the number of days the employees stayed in India, as tabulated by the respondent, is reproduced below:

Particulars	Number of days
Total days for which employees were present in India	120
Less: Vacation days	36
Less: Common days	5
Less: Business Development days	35
Total days on which services were furnished in India	**44**

15. The assessing officer, for AY 2020-21, passed the draft assessment order alleging that the respondent constituted service permanent establishment in India in terms of Article 5(6) of the DTAA, since the number of days of stay of the employees exceeded 90 days. It was further alleged that the respondent also constituted 'virtual service permanent establishment' in India since it had also rendered advisory services to Indian clients from outside India. The assessing officer accordingly attributed entire receipts of ₹15,55,45,693/- received from Indian clients to the alleged virtual service permanent establishment of the respondent in India, as chargeable to tax in India.

16. During AY 2021-22, none of the employees of the respondent visited India to render legal advisory services, which were only rendered from outside India. The assessing officer, again alleged that the respondent constituted virtual service permanent establishment in India since it had rendered advisory services to Indian clients from outside India. The total income of the respondent was accordingly determined at ₹7,97,64,414/- attributable to the alleged virtual service permanent establishment of the respondent in India.

17. The contention of Mr. Vohra is that as observed by the Tribunal, to constitute a service permanent establishment, actual performance of services in India through employees physically present in the country is essential and accordingly, only the days on which services were rendered by the employees within India shall be considered for computing the threshold limit for creation of a service permanent establishment in India. A service permanent establishment of an enterprise is constituted when such enterprise renders services in a country through its employees present within that country. According to Article 5(6) of the DTAA, furnishing of services by a Singapore enterprise within the other Contracting State (India) through employees present is an essential element for constitution of service permanent establishment of the Singapore enterprise in India. Mere presence of the employees of the Singapore enterprise in India, without services being rendered to the clients/ customers during the period of stay in India would not constitute service permanent establishment in India, in terms of Article 5(6) of the DTAA. In other words, only the days on which services are actually rendered to the clients in India, resulting in earning of income, is to be taken into consideration for computing the threshold limit.

18. He has relied upon the judgment of this Court in the case of ***DIT v. E-Funds IT Solution, [2014] 364 ITR 256 (Del)***, wherein it was held that a service permanent establishment would be constituted only if the foreign enterprise had performed services in India through their employees or personnel, i.e., personnel engaged or appointed by the foreign assessee. The words "*employees*" and "*other personnel*" must be read along with the word "*through*" and furnishing of services by the foreign enterprise within India.

19. He has submitted that the above judgment has been affirmed by the Supreme Court in ***ADIT v. E-Funds IT Solution Inc., [2017] 399 ITR 34 (SC)***, by relying upon another decision in ***DIT v. Morgan Stanley and Co., [2007] 292 ITR 416 (SC)***. It was observed by the Supreme Court that for constituting service permanent establishment of an enterprise in India, it is essential that such enterprise must furnish service "*within India*" through employees or other personnel.

20. According to Mr. Vohra, it becomes apparent from the above that:

(i) The physical presence of the employees (of the Singapore enterprise) in India for furnishing services has to be taken into consideration;

(ii) Days on which no services were furnished by the respondent to its clients are to be excluded while computing the threshold period of 90 days for the purposes of Article 5(6)(a) of the DTAA.

21. As regards the calculation of the number of days for which the employees rendered services in India to Indian clients, Mr. Vohra has argued that the following days need to be excluded for the corresponding reasons:

(i) Vacation days- 36 days

The days on which the employees in India were on leave/ vacation would not be taken into account for computing the threshold limit of 90 days since no services were rendered to the clients. The employees of the assessee, being of Indian origin, have taken personal leaves for a block period of 16 days on two occasions and 4 days on one occasion, totaling to 36 days. No services were rendered by the

assessee to its clients through the presence of such employees on the days on which they were on vacation.

(ii) Common days- 5 days

Common days spent by more than one employee are to be counted in unison. The argument of the Revenue that one common day on which three employees have rendered services must be counted as three days would lead to absurdity. In cases, for instance, if 3 employees have spent 150 days each in a country; accepting the argument of the Revenue would mean that the total period of their stay in India would be 450 days, which exceeds the total number of days in a year.

(iii) Business development days- 35 days

The days spent by the employees for the purpose of business development activities have rightly been excluded by the Tribunal, since it is evident from the time-sheets of the employees that no billable work was done on those days, i.e., no services were rendered by the assessee to its clients. During such business development days, the employees have rendered services to the assessee for developing its business and exploring new clientele in India; the assessee did not furnish any service to its clients in India resulting in earning of any income.

In this regard, he has drawn our attention to the OECD Model Tax Convention 2017 (OECD Commentary), which clarifies that for constitution of service permanent establishment, the enterprise must render services to third parties through its employees; rendition/ furnishing of services by the employee to the employer cannot be considered for determination of service permanent establishment.

22. It is his submission that in view of the above, the question of law (A) needs to be answered in the negative and in favour of the respondent.

23. Regarding constitution of service permanent establishment, the OECD Commentary emphasises on the performance of services through the presence of employees (of an enterprise resident in a Contracting State) in the other Contracting State. Relevant extracts of the OECD Commentary are reproduced hereunder:

> *"152. Also, the provision only applies to services that are performed in a State by a foreign enterprise. Whether or not the relevant services are furnished to a resident of the State does not matter; what matters is that the services are performed in the State through an individual present in that State."*

The aforesaid extract of the OECD Commentary was also taken note of by the Supreme Court in ***E-Funds IT Solution Inc (supra)***.

24. He submitted that the Tribunal rightly concluded that in the absence of any express provision in the DTAA regarding establishment of a virtual service permanent establishment, the assessing officer erred in relying upon the OECD Interim Report, 2018 and the laws of Saudi Arabia to allege that the respondent constituted a virtual service permanent establishment in India for the services provided to Indian clients from outside India. The Interim Report of the OECD, relied upon by the assessing officer, only refers to a minority view expressed by some countries that the requirement of physical presence is no longer relevant for the constitution of service permanent establishment as services can be rendered from remote locations as well. Pertinently, paragraph 354 of the said Interim Report, however, notes that there are no consequent amendments made in the DTAA in this regard.

25. Mr. Vohra further submitted that in terms of Section 90(2) of the Act, the meaning of service permanent establishment as provided in Article 5(6) of the DTAA will assume primacy and will prevail for the purpose of determining the existence of permanent establishment in India. Reference in this regard is made to the judgments in the cases of ***Union of India v. Azadi Bachao Andolan, [2004] 10 SCC 1 (SC)***; and ***Engineering Analysis Centre for Excellence (P) Ltd v. CIT, [2021] 432 ITR 471 (SC)***. It is submitted that notwithstanding the introduction of the concept of Significant Economic Presence through Explanation 2A to Section 9(1)(i) of the Act, unilateral amendments made in the Act cannot override the provisions of the DTAA. To buttress this argument, he has referred to the judgments in ***DIT v. New Skies Satellite BV, [2016] 382 ITR 114 (Del)***- approved in ***Engineering Analysis Centre for Excellence (P) Ltd. (supra)***; and ***CIT v. Telstra Singapore Pte. Ltd., [2024] 467 ITR 302 (Del)***.

26. Mr. Vohra stated that as such, the question of law (B) also needs to be answered in the negative and in favour of the respondent.

27. He has prayed that the appeals be dismissed.

ANALYSIS AND CONCLUSION

28. Having heard the learned counsel for the parties and perused the record, at the outset, we may state that the issue that arises for consideration is whether the respondent/assessee has a service permanent establishment or a virtual service permanent establishment in India so as to be taxed on the gross total receipt for the two assessment years being AYs 2020-21 and 2021-22 to the extent of ₹15,55,45,693/- and ₹7,97,64,414/- respectively for providing legal advisory services to its clients in India.

29. Article 5(6) of the DTAA contemplates that an enterprise shall be deemed to have a permanent establishment in the contracting state through its employees or other personnel only if the activities within the contracting state continue for a period aggregating to 90 days in any fiscal year.

30. The contention of Mr. Rai is primarily that the respondent/assessee fulfills the requirement, having carried out the activities in AY 2020-21 through its employees in India for more than 90 days. Even otherwise, as the activities were also being virtually performed by the assessee from outside India, a virtual service permanent establishment has been established, meaning thereby that the receipts of AY 2021-22 would also be taxable in India.

31. At the cost of repetition, we note that the assessing officer while passing the assessment order on 28.07.2023 held that the assessee constituted a service permanent establishment owing to the physical presence of its employees in India and also a virtual service permanent establishment in terms of Article 5(6) of the DTAA. It was observed that the duration of physical presence of the employees in India is immaterial, in view of the fact that the aggregate duration of provision of services by the assessee exceeded 90 days.

32. The DRP, while deciding the appeal filed by the assessee against the draft assessment orders, has in paragraph 4.1.5 stated as under:-

> *"4.1.5 A plain reading of para 6 of Article 5 makes it clear that in order to constitute a service PE in India the activities of providing service should continue within India for a period of more than 90 days. What is important is the aggregate duration of provision of services by the non-resident within India is more than 90 days and not*

the stay of the employees of non- resident in India, per se. It is possible that the services can be provided by the employees of the assessee by being stationed in India or the same can be provided within India with the help of technology from outside. The India Singapore DTAA no where makes it mandatory that the employees providing services within India must be stationed in India. As long as the criteria of aggregate period of continuation of service within India being more than 90 days is satisfied, constitution of a service PE gets triggered and consequent profits attributable to the PE becomes taxable in India. This proposition is also supported by the 2018 OECD report as discussed by the AO in para 10.7 and 10.8 of the DAO. Hence, the panel finds no infirmity in the approach of the AO to arrive at his conclusion regarding existence of PE on the basis of total duration of the services provided within India. Duration of physical presence of the employees of the assessee is not material. The AO is however directed to verify from the documents and evidences placed on record that the criteria of aggregate duration of rendering of services within India of more than 90 days is satisfied in the instant case, and pass a speaking order in this regard . Ground numbers 1 to 5 are accordingly disposed of."

33. The conclusion drawn by the DRP is that as long as the aggregate period of continuation of service within India is more than 90 days, the constitution of service permanent establishment gets triggered and consequent profits attributable to permanent establishment becomes taxable in India.

34. Allowing the appeals preferred by the assessee against the final assessment orders, the Tribunal has disagreed with the decision of the assessing officer and the DRP, relevant observations whereof have been reproduced by us in paragraph 4 above. The conclusion drawn by the Tribunal as stated above is that as per Article 5(6) (a) of the DTAA, actual performance of services in India by employees physically present in the country is necessary, and as the assessee has only rendered services to its clients for 44 days, excluding vacation, business development days and common days spent by its employees in India, it does not meet the 90 days criteria to constitute a service permanent establishment in India during AY 2020-21 as per the DTAA. Insofar as AY 2021-22 is concerned, the Tribunal held that the profits of the assessee are not taxable in India in the absence of a permanent establishment as per the DTAA, as no employee of the assessee was present in India.

35. It is not in dispute that as noted previously, two employees of the assessee, Mr. Rahul Guptan and Mr. Shashwat Tewary travelled to India for rendering services to its clients. It has come on record that they were present in India for a total of 120 days. It is the case of the assessee that they have rendered services only for a total of 44 days, since they spent 36 days on vacation, 35 days on business development, and 5 days were common days when the stay of both the employees coincided.

36. The submission of Mr. Rai regarding AY 2020-21 is that the Tribunal erred in excluding 36 days from the total of 120 days by treating the same as vacation days. According to him, this is clearly erroneous as the assessing officer has given a categorical finding that the assessee failed to produce reliable documentary evidence to show that the employees were on leave for

36 days during assessment year 2020-21. According to him, nothing has been brought on record by the assessee to show that the employees did not provide any services during the business development days as well.

37. It may be stated here that in support of its case that the two employees have worked for 44 days each, the assessee has filed the time-stamp sheets of the employees before the assessing officer and the Tribunal, which depict the days on which the aforesaid two employees worked for the Indian clients, and also the details of bills made out to the clients in India and the amounts received thereof.

38. It follows that the contention of the Revenue that despite its demand, the assessee has not placed before it the entire e-mail correspondences of the two employees during their entire duration of stay in India would not have any material effect on the conclusion drawn by the Tribunal, as in any case the assessee had provided the time sheets for the employees wherein annual leave has been captured, and also the leave record extracted from its HR system. That apart, the assessee has also furnished a declaration that these employees did not work on client projects during their vacation period. All these indicate that if the vacation days are excluded from the total 120 days for which the employees of the assessee were present in India, the number of days would come to 84 days, which is less than the threshold of 90 days provided under Article 5(6)(a) of the DTAA for constitution of a service permanent establishment in India.

39. The Tribunal further held that business development days as well as common days comprising of 35 days and 5 days respectively also need to be excluded while computing the threshold of service permanent establishment. The reasoning given by the Tribunal for such a conclusion is that no services

were provided by the employees to customers in India during the time spent on business development and that the computation should not be based on man days by aggregating the common days spent by more than one individual. In effect, the Tribunal found that actual services have been furnished only for 44 days out of the total duration of 120 days of their stay in India. It is only logical that only the days on which actual services were rendered by the employees of the assessee need to be considered while computing the threshold limit of 90 days. In fact, the Revenue themselves have raised a submission that what matters while examining the constitution of a permanent establishment is not the presence of the employees, but the actual services rendered by the assessee.

40. As such, the Tribunal was justified in holding that no permanent establishment of the assessee was constituted in AY 2020-21. We are in complete agreement with the decision and the reasoning given by the Tribunal.

41. Another issue that has been raised is that even when the employees were not physically present in India, services continued to be rendered virtually, for more than 90 days. That apart, in AY 2021-22, though the assessee did not have physical presence of any employees in India, services were still provided virtually by the assessee to its clients in India, and as such, it constituted a virtual service permanent establishment in India. The view of the assessing officer, as propounded by the Revenue before the Tribunal and before us, is that as a result of rapid digitalisation, services including consultancy services can be provided virtually without the physical presence of employees in the contracting state. According to them,

nothing in the DTAA requires the employees to be physically present in India for providing the services.

42. Article 5(6)(a) of the DTAA reads "*An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services… within a Contracting State through employees or other personnel…"*. The words "*within a Contracting State*" and "*through employees or other personnel*" contemplates rendition of services in India by the employees of the non-resident enterprise, while mandating a fixed nexus; a physical footprint within India. The term '*within*' has a certain territorial connotation and in the absence of personnel physically performing services in India, there can be no furnishing of services '*within*' India. A plain reading of the whole provision would thus reveal that, it such rendition of services by employees present within the country which would constitute a service permanent establishment.

43. Mr. Rai has vehemently contended that receipts on account of virtual services rendered by the assessee must be held to be amenable to taxation in India, since a 'virtual service permanent establishment' has been established. We find that no such eventuality is contemplated by the DTAA. The concept of a virtual service permanent establishment does not find mention anywhere in the DTAA. In the absence of any such provision, the argument of Mr. Rai would be at variance that the express provisions of the DTAA which we have already interpreted above.

44. At this juncture, we find it necessary to acknowledge that the Revenue may potentially be justified in raising concerns regarding taxability of foreign entities in the increasingly open global virtual economy, and the diminishing requirement of physical presence of non-resident employees to

furnish services. However, taxability of entities in such instances, as always, remains subject to the applicable provisions of law- both treaty and domestic.

45. The law insofar as the present controversy is concerned, is clear and unambiguous. The DTAA, which has been carefully drafted and executed after numerous rounds of bilateral deliberations and negotiations at the highest level, must necessarily be interpreted strictly. If something is conspicuous by its absence, the presumption is that it has deliberately been done so. It is not for courts to read in concepts which are not expressly provided for by the treaty. The guiding principle here is that language which is not explicitly included in treaty provisions cannot be artificially read into such provisions by way of judicial fiction.

46. As already stated, Article 5(6) of the DTAA only contemplates rendering of services by employees present within the country. If that be so, it is not for this Court to analyse the status or merits of a virtual service permanent establishment which does not find mention either in the DTAA or in the domestic Act. As such, the contention of the Revenue that a virtual service permanent establishment of the assessee has been established for AYs 2020-21 and 2021-22 cannot be accepted.

47. Much reliance has also been placed by the Revenue on the OECD Interim Report of 2018 to contend that though traditionally, physical presence of employees of the non-resident enterprise in the source country was required to establish a service permanent establishment, many jurisdictions are moving away from the same. The assessing officer in his order has provided examples of some countries including Saudi Arabia, Israel and Kuwait to show that in the present digital economy, even if

services are performed entirely offshore, it would constitute a service permanent establishment.

48. This, according to us, is primarily at variance with the treaty language of the DTAA, which expressly provides that a permanent establishment of an enterprise shall be deemed to have been established in the contracting state if it furnishes services '*within*' the contracting state '*through employees or other personnel'*.

49. That being said, it is necessary to note that the comments made by India as recorded in the OECD Model Convention, and also the concept of Significant Economic Presence (SEP) brought about in the domestic tax jurisdiction through the Finance Act, 2018, do reflect a deliberate policy to capture digital or virtual economic participation outside the traditional permanent establishment framework. It may also be true that certain jurisdictions have moved away from the requirement of physical presence of employees to constitute a service permanent establishment. However, the same has not been administratively recognised by India, and in the absence of any changes made to the treaty provisions of the DTAA, such developments do not alter the interpretive constraints imposed by the wordings of the DTAA, which is applicable on all fours to the instant case. In fact, until Article 5(6) of the DTAA is renegotiated or supplemented, the existing treaty framework does not extend to virtual or digital services provided from abroad.

50. It is apposite to note that the OECD Interim Report of 2018 itself in paragraph 354, states "*However, in the absence of any amendments to the tax treaty provisions themselves, these measures run the risk of being challenged by taxpayers before Courts.*", which would also suggest that tax

treaty provisions need to be amended for the recommendations stated in the Report to have a binding statutory effect.

51. The case set up by the Revenue is premised on the ratio of the order of the Bangalore Bench of the Tribunal in ***ABB FZ-LLC (supra)*** wherein, according to Mr. Rai, the concept of a virtual service permanent establishment was recognised. The relevant part of the order runs as under:

> *"47. Now, if we read clause (2)(i) of Article 5 of the DTAA, then it is clear that for the purpose of service PE, the following ingredients are required to exist:*
>
> *(i) That the enterprise furnishing services including consultancy services of the other contracting state;*
>
> *(ii) (ii) The said services were furnished through the employees or other personnel in the other contracting State;*
>
> *(iii) (iii) Such activities continued for the same project or connected project for a period or periods aggregating more than 9 months within any twelvemonth period.*
>
> *48. Therefore it is clear that furnishing of services including consultancy services by assessee to ABB Ltd. for the project in India or with connected Project was for a period 3 months after commencing its activities in January 2010. Thus it fulfill are the prerequisite of service PE and in our view service PE do not require permanent establishment as well. In the present age of technology where the services, information, consultancy, management etc., can be provided with various virtual modes like e-mail, internet, videoconference, remote monitoring, remote access to desktop, etc., through various software, therefore, the argument of fixed place of business, raised by the Ld Senior Advocate for the assessee that three employees were rendered services only for 25 days cannot be sustained, as the services can be rendered without the physical presence of employees of the assessee.*
>
> *....*
>
> *52. It is not disputed by the assessee that the assessee was providing the services of consultancy in the other contracting*

state i.e., in India. It is also not disputed that the enterprise was rendering these services through its employees. It is however, submitted by the Ld. Senior Advocate that the employees of the company remained in India only for 25 days and, therefore, the third condition of stay in India for more than 90 days, is not attracted.

53. As per our reading it is not the stay of the employees for more than 9 months, which is required to be there but it is fact of rendering of services or activities which was required to be rendered for a period of nine months. If we look into the reply submitted by the assessee in April 2012 and June, 2012, then it is clear that the assessee:

(a) Has rendered the services through its three employees and their stay was for 25 days; and

(b) As is clear from the second reply, the assessee has rendered the services on various occasions from January to March 2010.

54. The providing of services for a period of nine months is stipulated in the period of 12 months. In our view, once the activity of the assessee commenced only in the month of January, 2010, then the argument of completing 9 months service before March, 2010, is preposterous, implausible and against the common sense. It is not expected to complete 9 months between January, 2010 to March, 2010. The completion of 9 months activities by the enterprise was only conceived in a period of 12 months. However is not disputed by the assessee before us that the enterprise/assessee continues to render the services with effect from January, 2010 and thereafter also in the subsequent assessment year.

...

56. Thus respectfully following the path shown by the Apex Court (supra), in our view, the requirement of fixed place of business is not applicable to the clauses (2), (4) and (5). Clause (i) of Article 5(2) which provides the service PE, is not dependent upon, the fixed place of business as is only

dependent upon the continuation of the activity for the same project or connected project for a period/periods aggregating to more than 9 months within 12. Accordingly we hold that assessee is having the service PE in India. However the determination of this issue will only have any bearing on the issues under considerations if on examination of facts we come to conclusion that the activities of the assessee do not fall in any of the Article of DTAA."

52. The Tribunal in the order impugned herein, considered the order of the Bangalore Bench, and observed as under:

"In our considered view the reliance placed by the Ld. AO in the case of ABB FZ LLC is misplaced as the facts of that case and the context in which this decision was rendered by the Mumbai Tribunal differs from the facts of the assessee's case in hand. In ABB FZ LLC the main issue was whether FTS is chargeable to tax in India when India-UAE DTAA does not contain an Article for taxation of FTS. In ABB FZ LLC case services provided by the assessee to its Associated Enterprise in India was considered as FTS which was not disputed and the Tribunal held that in the absence of provision in India-UAE DTAA to tax FTS, same would be taxed as per Article 7 of the DTAA applicable for business profit and in the absence of PE in India the income of the assessee was held to be non - taxable in India. Whereas in the case (s) at hand the services are furnished to independent Indian clients and the taxability of FTS income under the Act viz. a. viz the treaty was determined which is not the assessee's case."

53. Suffice it to state, the Bangalore Bench of the Tribunal was dealing with a matter on an entirely different footing. The assessee therein was an entity based in the United Arab Emirates (UAE) engaged in the business of providing regional services for the benefit of legal entities in India, the Middle East and Africa. The assessee received payments for services

rendered, which it claimed to be not taxable in India, as the DTAA between India and the UAE does not contain any provisions for Fees for Technical Services (FTS), and as such the taxability would fall under Article 22 of that DTAA, according to which, the amount would be taxable in India only if the entity had a permanent establishment in India. The assessing officer was of the view that the services rendered by the assessee would be treated as FTS and also as 'royalty' under the DTAA therein as well as the domestic Act. The Tribunal distinguished Articles 5(1) and 5(2) of the India-UAE DTAA, to hold that while a fixed place of business is necessary for a permanent establishment under the former provision, the latter one, which contemplates services rendered, is rather inclusive and does not require the assessee to have a fixed place of business. As such, it dismissed the argument of a fixed place of business raised by the assessee by observing that in the present age of technology, services can be rendered even without the physical presence of employees in India and held that by furnishing services, the assessee clearly established a service permanent establishment, by virtue of Article 5(2) of the DTAA therein.

54. Suffice it to state, the instant case is palpably different from the above. This is neither a case concerning FTS nor has any argument of requirement of a fixed place of business been raised. That apart, unlike that case, the issue at hand is squarely covered by the express provision of Article 5(6) of the DTAA, which we have already interpreted above.

55. Mr. Rai has relied upon the judgment of the High Court of Madras in ***Verizon Communications Singapore Pte. Ltd. (supra),*** which relates to the issue whether payments made by Indian customers to a non-resident Singapore entity should be treated as 'royalty' under the DTAA and the Act.

We find that the issue of permanent establishment was neither raised nor argued before the Court, as can be seen from the first part of the paragraph relied upon by Mr. Rai himself:

> *"101. Although the assessee has submitted a voluminous paper book on case law, except for those that are discussed above, others were not touched by the assessee and, hence, we have not considered it necessary to discuss these decisions. We may also note that except for making the submission on the question that the transaction is only a service and, hence, the consideration is not royalty, no arguments are made on permanent establishment or on the effect of the amendments. The assessee had submitted a detailed written submission on the clauses in the agreement and on the legal submissions. After considering the same, with reference to the arguments made by the learned senior counsel on the issue of royalty, vis-à-vis the agreement terms, we hold that the order of the Tribunal does not call for any interference. Although in his reply, learned senior counsel appearing for the assessee pointed out to article 5 on permanent establishment to contend that VSNL is not an agent and, hence, cannot be construed as a permanent establishment of the assessee, no arguments are advanced on this account. …"*
>
> (emphasis supplied)

56. As such, the observations made by the Court, as relied upon by Mr. Rai and reproduced in paragraph 11 above, can only be *obiter dicta*, and not an authoritative view on the issue.

57. Another judgment that has been placed before us is ***Hyatt International Southwest Asia Ltd. (supra)*** where the Supreme Court was concerned with the question as to whether under Article 5(1) of the India-UAE DTAA, the appellant, a UAE resident, had a fixed place of business or otherwise a permanent establishment in India, such that the income it earned under the Strategic Oversight Services Agreement from Indian hotels is

taxable in India under Article 7 of that DTAA. As stated by Mr. Rai, the Supreme Court held that the relevant test is the continuity of business presence in the aggregate and not the stay/duration of any particular individual. In other words, once continuity of business operations is established, the "*intermittent presence or return of a particular employee becomes immaterial and insignificant*" for constituting a permanent establishment. This judgment is distinguishable on facts, as there is no argument raised before us with respect to the stay of any one particular individual in India; rather is the aggregate time of stay of employees of the assessee that has been taken into consideration to examine whether the threshold mandated by the DTAA has been reached.

58. Mr. Rai has drawn our attention to a judgment of the South African Tax Court at Johannesburg in ***AB LLC and BD Holdings LLC and The Commissioner of the South African Revenue Services, Case No. 13276*** decided on 15.05.2015, to contend that (i) even if part of services are rendered from a place different to that contemplated by the DTAA, it would still comply with the definition of permanent establishment; and (ii) 'double counting' of days is permitted while computing the threshold for permanent establishment. On a perusal of the judgment, we find that the reliance put on the judgment by Mr. Rai is misplaced. The Tax Court therein was concerned with a DTAA entered between the Republic of South Africa and the United States of America. The Court found that as per Article 5(1) of that DTAA, even if the appellant therein had only conducted part of its business from the boardroom allocated to it, it would still comply with the definition of fixed place permanent establishment. Needless to state, such a scenario does not arise in the case before us. Further. The Tax Court read Article 5(2)(k) of the

DTAA therein, which stated that the "*periods aggregating more than 183 days in any 12-month period commencing or ending in the taxable year concerned*" as allowing the relevant aggregation over any 12-month period that commences or ends in the taxable year; i.e. the test is met by looking at 12-month windows and aggregating presence across those windows. The Court therefore did not accept the argument of 'no double-counting' raised by the taxpayer, and instead treated the 183-day test as a rolling/aggregating time test that can span and overlap assessment years where the treaty language so provides. As such the Court held that a permanent establishment has been established by the appellant therein. No parallel can be drawn from this to the present case, as the language of Article 5(6) of the DTAA here is fundamentally different. We are neither concerned with the applicability of a fixed place permanent establishment, nor with an issue of aggregation of days across multiple assessment years.

59. Mr. Rai has also referred to a judgement of the Spanish Supreme Court in the case of ***Spain v. Dell, Tribunal Supremo, STS 2861/2016; Case No. 1475/2016*** decided on 20.06.2016, which dealt with a controversy between Dell Products Ltd. (DPI) – an Irish resident company, which sold computers in Spain through a Spanish group affiliate – Dell España (DESA) which acted commercially as a commissionaire/local distributor and also provided after-sales services and coordination functions. The tax treaty that governed the issue was a Double Taxation Agreement between the Kingdom of Spain and the Republic of Ireland. The Court found that the premises and personnel of the Spanish affiliate were to be regarded, even if indirectly, as put at the disposal of the Irish principal, because the activities carried out at those premises were the business activities of the non-resident in Spain. The

Court emphasised that the non-resident need not have formal legal title or its own staff physically present on site; substantial use of the Spanish affiliate's premises and staff for the principal's business would suffice to constitute a fixed place of business. It also found that DESA also met the dependent-agent permanent establishment test because it habitually acted for DPI and had substantial dependence and control essential for the corporate affairs of DPI. Though a question whether the website of the appellant therein would constitute a permanent establishment was raised, the Court deemed the same irrelevant, as a fixed place and a dependent-agent permanent establishment have already been established. We cannot see how this case would come to the aid of the submissions put forth by the Revenue.

60. In view of the foregoing discussion, we find that the Tribunal was justified in passing the impugned order. We agree with the reasoning given by the Tribunal and find no reason to interfere with the same.

61. The substantial questions of law A and B are both answered against the appellant/Revenue and in favour of the respondent/Clifford Chance Pte. Ltd.

62. Accordingly, the appeals are dismissed.

V. KAMESWAR RAO, J

VINOD KUMAR, J

DECEMBER 04, 2025