IDENTIFICATION OF

PERMANENT ESTABLISHMENT

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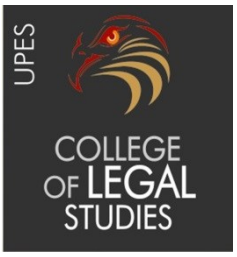
This dissertation is submitted in partial fulfillment of the degree of B.A., LL.B. (Hons.)/B.B.A., LL.B. (Hons)



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CERTIFICATE

This is to certify that the research work entitled **"Identification of Permanent Establishment"** is the work done by Sagar Mehrotra under my guidance and supervision for the partial fulfillment of the requirement of B.B.A., LL.B. (Hons) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

Signature & Name of Supervisor

Designation

Date

DECLARATION

I declare that the dissertation entitled **"Identification of Permanent Establishment"** is the outcome of my own work conducted under the supervision of Asst. Prof.Sujith P. Surendran, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of Student

Date

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List of Abbreviations

All:	Allahabad High Court
BC:	Business Connection
Bom:	Bombay High Court
Cal:	Calcutta High Court
CBDT:	Central Board of Direct Taxes
CIT:	Central Income Tribunal
Co:	Company
ECD:	E-Commerce Development Reports
GATS:	General Agreement on Trade in Services
ICS:	Integrated Computer Solutions
ISP:	Internet Service Provider
ITA:	Income Tax Act
ITR:	Income Tax Reports
Ltd.:	Limited
OECD:	Organization for Economic Co-operation and Development
OEEC:	Organization of European Economic Cooperation
PE:	Permanent Establishment
Raj:	Rajasthan High Court
SC:	Supreme Court
UN:	United Nations

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1. CIT v Visalakshi Achi reported in [1937] 5 ITR 448
2. G V K Industries Ltd v ITO reported in [1997] 228 ITR 564
3. CIT v Metro Goldwyn Mayer (India) Ltd [1939] 7 ITR 176 (Bom)
4. Jamnadas Brij Mohan V CIT [1962] 46 ITR 233 (All)
5. Bikaner Textile Merchants Syndicate Ltd v CIT [1965] 58 ITR 169 (Raj)
6. Bangalore Wollen, Cotton & Silk Mills Co Ltd v CIT [1950] 18 ITR 423, 433 (Mad)
7. Bikaner Textile Merchants Syndicate Ltd v CIT [1965] 58 ITR 169 (Raj);
8. A P Damodara Shenoy v CIT [1954] 26 ITR 650 (Bom)
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13. Anglo French Textile Co Ltd v CIT [1953] 23 ITR 101 (SC)
14. CIT v Toshuku Ltd [1980] 125 ITR 525 (SC)

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1. Introduction

Permanent Establishment is characterized under Income Tax Act to include a fixed place of business through which the business of the enterprise is wholly or partly carried on. The definition is in a state of harmony with the Fixed Place Permanent Establishment as set in the Double Taxation Avoidance Agreements.

As indicated by the domestic law, the assessment of business benefits of non-residents in India is commenced with a business association in India. The inference of business association in India according to the Income Tax Act is wide and would prompt esteeming the Income 'to collect or emerge' for the remote venture in India. The presence of Permanent Establishment in India neither implies that there is business association for the outside big business in India nor that there is Income regarded to accrue in India. Permanent Establishment in India would mean an outcrop of the outside foreign enterprise in India and is particularly characterized in the Double Taxation Avoidance Agreements. Article 7 of the Double Taxation Avoidance Agreements stipulates that only the profits directly or indirectly attributable to the Permanent Establishment in India would be taxed in India. Thus the Permanent Establishment that produces wage with a business association in India will be assessable in India. The Permanent Establishment of the foreign enterprise in India may utilize its advantages and assets to procure wage both in India and outside India, however just the fragment of Income that identifies with the business association in India is exhausted. Without business association in India, the Permanent Establishment would simply be an assessable element and not an assessment paying substance. The significance of business association in the residential law would be a mix of Fixed Place Permanent Establishment and Agency Permanent Establishment as set in the Double Taxation Avoidance Agreements.

This dissertation sets out the criteria for distinguishing a Permanent Establishment. The different rules and tests are talked about in subtle element in the wake of alluding to the different discourses investigating the standards. Indian judicial pronouncements have been alluded to pick up understanding the circumstance on Indian situation.

2. History

The permanent establishment (PE) concept has a history as long as the history of double taxation conventions. Customary ideas identified with Permanent Establishment were drafted amid the Old Economic Era. An early form of the PE guideline has been followed to the late 1800s, when European countries arranged reciprocal duty bargains to oversee the assessment treatment of cross-fringe monetary action. Hypothetically, the ideas composed a conceptual idea of perpetual foundation with a specific end goal to focus the taxability of financial exercises conveyed in the domain of another sovereign state.[1] The center of the hypothesis was to characterize the subjective and target components that made tariff pertinent to material or physical exchanges. Inside the customary monetary setting of this hypothesis a material or physical exchange occurred if a characteristic or juridical individual created substantial conservative exercises in a certain region for a base time of time. Thus, if customary monetary exercises met the conditions put forward in the thought of perpetual foundation charge incomes could be distributed to the separate sovereign state were these exercises were carried on.

In a worldwide setting, all states depict the extent of wage over which they apply saddling purview through diverse expense apportioning principles. In agreement to customary routes in which financial exercises are produced, the vital tenets in which most assessment administrations base their duty distribution have a regional base. These guidelines are grounded on the "place of residence" of a physical individual and on the "place of source" of financial exercises.

The cutting edge form of the principle emerged after World War I when countries got to be worried that worldwide twofold assessment was hindering global exchange and venture. In light of developing concern, the League of Nations appointed a gathering of assessment experts to concoct an instrument to guarantee that twofold levy would be evaded. The gathering touched base at an agreement and built up the PE idea that got to be revered in a 1927 model expense tradition and later received in the 1963 OECD model duty settlement (and additionally ensuing updates of this model

[1] R.S.J. Martha, The Jurisdiction to Tax in International Law, Kluwer (1989), p 22. Also, Luc Hinnekens, De territorialiteit van de Inkomstenbelasting op nieuwe wegen en grondslagen, Kluwer (1993), pp 28 et seq.

arrangement in 1977 and 1992). At the multilateral level, the wording of the different draft traditions has developed from the League of Nations drafts of 1927, 1933, 1943 and 1946 through to the OECD Model Tax Convention in 1963 and its modification in 1977 and 1992.

Presently, the International tax standards for crediting benefits to a PE are given in Article 7 of the OECD Model Tax Convention on Income and on Capital (OECD Model Tax Convention), which frames the premise of the broad system of respective pay charge arrangements between OECD Member nations and between numerous OECD Member and non-part nations. These standards are additionally fused in the Model United Nations Double Taxation Convention in the middle of Developed and Developing Nations. Recorded practice has grown such that two expansive translations of the term are most basic by the Member nations. Furthermore, there are further varieties, which may must be considered. The most imperative of which identifies with the importance of the expression "profits". This piece of the Report investigations the two expansive understandings in more detail and talks about quickly conceivable varieties in the understanding of the expression "profits". Truly, the nations have demonstrated hesitance to consider restricting their attribution of profit by reference to exercises performed by different PEs.

2.1 Traditional PE

Under the traditional PE priniple, the nation in which a non-inhabitant business leads its business (the source nation) concurs that it won't tax cross-border profits coming about because of a non-occupant's exercises unless the non-residant keeps up a PE inside the borders of the source nation and benefits can be credited to the attributed of that PE. The nation where a business is based (the residence nation) commonly consents to concede a tax credit for the amount of taxes paid to the source nation to stay away from global double taxation assessment. On the other hand, the resident nation can be excluded to levy any salary earned by a PE situated in a source nation.

In the customary economy the fundamental states of a perpetual foundation are identified with the topic of presence of a "fixed place of business"[2]. The qualification of the place of business and the fixed component embody three principal angles: situs, locus et and tempus. As indicated by regulation and reports, so as to focus the presence of an fixed place of business it is important to agree to the "place of business test", the "location test" and the "permanence test". In spite of the fact that alternate components portrayed under the "right of use test" and the "business activity test" are important, their investigation show a lower level of intricacy as the previous ones at a global tax level[3]. In essence, the traditional PE is supposed to represent a fixed physical presence within the source country that lasts for a significant period of time and performs integral aspects of a cross-border transaction.

With respect to the situs test, the presence of a fixed place of business is controlled by the presence of a fixed place where activities are done, for example, premises, offices or as further advancement in specific occurrences, to hardware or even considerable gear. With respect to the locus test, the first sense given is that there must be a connection between the place where the business is produced and a particular topographical point in the region of a state. The offices, premises, hardware or significant gear constituting the place of business must be really altered, as in they stay on a particular area inside a topographical site. With respect to the tempus test it streams that, since the place of business must be altered, the PE can just exist if the place of business has a certain level of permanency in time and is not only briefly (de minimis tempus). The time relies on upon the way of the activities or the circumstances in which the financial movement is produced. At long last, in the first idea, typically the matter of an undertaking is completed by people, for example, the proprietor actually or through its representatives or employees. In different cases, the business could be brought through operators following up for the benefit of the endeavour with forces to arrange and close contracts[4].

[2] Arvid A. Skaar, Erosion of a Tax Treaty Principle, Kluwer (1991), pp 75 et seq

[3] Alessandro Caridi, Proposed Changes to the OECD Commentary on Article 5: Part I –The Physical PE Notion, IBFD (2003),ET p. 9.

[4] OECD Commentary, Article 5. See also: Vogel, On Double Tax Conventions3 (1996) Article 5; Arvid Aage Skaar, Commentary on Article 5 of the OECD Model Treaty: The concept of Permanent Establishment, IBDF (1994); Francisco Alfredo Garcia Prats, El Establecimiento Permanente, Tecnos (1996), p 124 et seq.

2.2 Evolution of Principle

The principle has experienced a critical weakening amid the past half-century to consider rising business rehearses. Enhanced worldwide trade, the ascent of the administration segment, expanded mobility of capital, and different components of production all added to an apparent need to change the physical vicinity necessity of the customary PE. The PE definition was widened to incorporate dependant agents that constantly finish up contracts in source nations. Further, development undertakings enduring over 12 months constitute a PE. Additionally, PE fictions were produced to bypass the necessity of geographic and temporal permanence. The fictions guaranteed that makeshift and portable exercises fall inside the meaning of lasting foundation.

2.2.1 Dilution of the Requirement of Physical Presence

Some treaty provisions arranged between nations further weaken the PE guideline past the improvements inside model assessment arrangements. Case in point, the assessment bargain in the middle of Norway and the United Kingdom incorporates procurements to guarantee unadulterated source state tariff of seaward petroleum-related exercises, which "suggests that few of the customary conditions for PEs under the essential principle are totally surrendered.

The PE definition was amended to incorporate dependent agents that chronically finish up contracts in source nations. Further, development undertakings enduring over 12 months constitute a PE (frequently diminished to 6 months in duty settlements). Additionally, PE fictions were created to go around the prerequisite of geographic and temporal permanence. The fictions guaranteed that makeshift and versatile exercises fall inside the meaning of PE. Case in point, salary over a stipulated limit earned by performers inside source nations can be saddled by this state in spite of the nonappearance of any genuine altered place of business. Under the OECD model assessment arrangement, especially portable businesses, for example, transporting or air transport are exhausted where the spot of successful administration is found

At last, the U.N. model tax treaty has widened the meaning of PE to reinforce source state levy, which is normally in light of a legitimate concern for developing nations. Case in point, a PE inside that model assessment bargain is characterized to incorporate free specialists in a few circumstances, and additionally the execution of administrations that last more than six months. A "restricted force of attraction" administer also grows source state levy by allowing states where non-residents keep up conventional PEs to expense other wage that is pulled in to the PE, despite the fact that that salary is not specifically identified with the PE. Other multilateral assessment settlements, for example, the Andean Pact, moved to exclusive source-based tax, minimizing physical vicinity tests.

Expanded monetary combination alongside data innovation advancements, for example, the Internet speaks to a restored danger to the convenience of the PE idea.

2.2.2 The E-Permanent Establishment

Lately, the PE rule has pulled in restored consideration as a consequence of the coming of Internet and e-trade. The Internet, basically a system of systems connected by a typical correspondence convention, empowers and encourages remote financial action. Now and again, the Internet uproots the need for conventional go-betweens (for instance, remote branches) that were utilized to empower cross-outskirt exchanges. Rather than a customary store or station, PC servers (that is, PCs that are arranged to the Internet) can perform capacities like these conventional PEs, as the product inside the server can show a Web page on the Internet, take a client's request, acknowledge instalment, and transmit advanced products and administrations. Other data innovation improvements empower source state charge disintegration under customary standards by advancing the consolidation of foreign operations:

- the replacement of physical establishments with Web sites to transfer transaction costs to customers;
- a reduction of source country offices for customer support and after-sales services;
- the replacement of agents with remote contracting; and
- the enhanced provision of remote services.

Governments and commentators are worried that those new commercial developments would further weaken source nation tax jurisdiction and incomes, accelerating an officially troubling pattern.

.In November 1996 the U.S. Treasury was the first national tax authority to issue a report on the international tax policy implications of of e-trade. The discourse draft, which did represent official U.S. strategy, was intended to casing the arrangement difficulties exhibited by ecommerce. On the other hand, a worry emerged with the report's view that the way of the Internet and an increment in remote financial movement likely implied habitation built assessment would take in light of more prominent significance. That was a troubling proposal to numerous non-American taxing authorities as, then and now, the United States created and traded the lion's offer of global e-commerce. Further, the report recommended that servers would not likely constitute PEs under U.S. charge arrangement.

Interestingly, most other national duty powers took a more careful way to deal with the server/PE issue. Case in point, in 1998 Revenue Canada (as it was then) declined to take a position when a U.S. organization sought some information about the tax implications of putting away exclusive data on a Canadia based server. Two Canadian government reports distributed in 1998 recommended that a server may constitute a PE under a few circumstances. Other tax authorities, including the Australian Tax Office, likewise proposed that a server may constitute a PE.

Against that foundation, the OECD started to assume a dynamic part in attempting to help its agreement states achieve agreement on numerous universal e-business issues, including cross-border income and utilization tax issues. In October 1998, the then-29 OECD member states came to accord at the Ministerial Meeting on Global E-Commerce in Ottawa on the standards that ought to guide the development of international tax rules for e-trade. The OECD member states embraced the alleged Ottawa Taxation Framework Conditions, which attested that customary tax rules and standards ought to by and large be connected to e-trade. Further, the approach does not block new authoritative or administrative measures, or changes to existing measures, identifying with electronic business, gave that those measures are expected to help with the use of the current taxation standards. Any adjustment of existing international taxation standards ought to be organized to keep up the financial sway of

nations, to attain to a reasonable offering of the tax base and to evade double taxation and accidental non taxation. Other controlling standards incorporated the requirement for:

- maintaining neutral tax treatment between ecommerce and traditional commerce;
- low compliance costs for taxpayers and low administrative costs for tax authorities;
- clear and simple tax rules to promote business certainty;
- reducing the risk of tax evasion and tax avoidance; and
- flexibility to keep pace with technological and commercial developments.

Organizations and governments likewise marked on to about indistinguishable guiding principles in the Joint Declaration of Business and Government Representatives. It was clear that legislatures and organizations would not endure radical changes to the international income tax regime or new standards for e-trade alone. The OECD then selected a working group to study PEs. After a two-year time of issuing drafts and soliciting input, the group displayed its proposals in December 2000. The OECD embraced them into the commentaries to the OECD model tax treaty in February 2001. The commentaries basically make another PE classification for PC servers. In the meantime, the perspective that websites ought to constitute PEs was rejected. Servers now constitute a PE under the OECD model tax treaty if the server performs fundamental parts of a cross-border function and the non-inhabitant firm claims or leases the server inside the source nation. No human intermediary is obliged to program or administration the foreign based server. The commentaries offer an illustration of a retail server/PE that shows a webpage, takes a client's request, forms installment, and transmits a computerized decent or administration to the end customer. Under those circumstances, the server constitutes a PE qualifying the source nation for assessment benefits attributable to the server. Benefit attribution is likely a wellspring of discussion here.

OECD has issued yet another draft report about the subject of server benefit attribution as a component of its endeavors to achieve agreement on the use of benefit attribution in the connection of transfer pricing.

Servers and the product capacities inside a server shape piece of the equipment and programming base of the Internet. Those can be moved outside the nation where an e-commerce firm is based or where programming items are created, and outside the source nation where e-business products and services are bought. Two primary insufficiencies of the new rule have been distinguished. First and foremost, server/PEs won't adequately apportion taxing jurisdiction and income to source nations. Second, server/PEs offer assessment arranging open doors for multinational firms to move pay outside resident nations.

By endeavoring to create the internet analogs to the conventional PE idea, OECD member states have subverted the customary physical presence prerequisite to a huge degree. It stays misty whether this new manage will be effectively actualized by the OECD part states. Britain, Germany, and Switzerland have recommended that they won't take after the new administer in light of the fact that, in their perspective, servers ought not be utilized to make a nexus. Then again, Spain and Portugal disagreed from the OECD see because Web destinations ought to be dealt with as PEs, apparently with the expectation that more income would be designated to these net e-trade importing countries through a more extensive perspective of nexus for e-business purposes.

3. International Conventions

The UN Global Compact and the OECD Guidelines for Multinational Enterprises ("the OECD Guidelines") are the world's premier extensive, deliberate corporate obligation activities. In articulating standards of mindful business conduct, they draw on universal guidelines getting a charge out of boundless agreement.

3.1 OECD Guidelines

The endeavors of the Organization of European Economic Cooperation (hereinafter the OEEC) and its successor association, the Organization for Economic Cooperation and Development (hereinafter the OECD), to build up a framework for the evasion of double taxation where the preparatory exploration of the League of Nations left off. The Committee on Fiscal Affairs presented a progression of model bargain articles in four interval reports somewhere around 1956 and 1961 and a synopsis report in 1963 to which the complete model arrangement (hereinafter the OECD Model) and an authority critique (hereinafter the Commentary) were attached. The Commentary deciphered the OECD Model; to the degree OECD part states did not wish to take after specific suggestions of the model, they entered their reservations in the Commentary.

Definition Of Permanent Establishment As Defined In The OECD Model

"1. For the purposes of this Convention, 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, and

f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

4. 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;
f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name 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 person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.
> 6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that 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.
> 7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other."

The OECD Model and the Commentary were made the subject of a recommendation of the OECD Council to the member states pursuant to Article 5(b) of its charter.[5] The Council recommended that member states proceed with their endeavours to enter bilateral double tax agreements, that they adopt as the basis for their negotiations the model submitted by the Fiscal Committee

> "as interpreted by the Commentaries in the Report," and that they make allowances for the limitations and reservations contained in the Commentary. 33 In the following years the OECD Model and Commentary were revised by the Fiscal Committee based on practical experience. In 1977 the Committee published a new report with a partially revised model and Commentary, which were once again sanctioned by a recommendation of the Council.3 4 The changes did not affect the model as much as the Commentary, which was made more comprehensive and in which the number of reservations was

[5] Organization of Economic and Development, Report of the Fiscal Committee: Draft Double Taxation Convention on Income and Capital gains 167 (1963)

> increased. Aside from the reservations, a number of member states included "observations"; these observations "do not express any disagreement with the text of the Convention, but furnish a useful indication of the way in which those countries will apply the provisions of the Article in question."

Article 5 (Permanent Establishment) of the OECD Model Tax Convention incorporates the meaning of the settlement idea of Permanent Establishment, which is basically utilized with the end goal of the allotment of taxing rights when an undertaking of one State gets business profits from another State.

It could maybe be contended that in the general definition some notice ought to additionally be made of the other normal for a perpetual foundation to which some significance has here and there been appended previously, to be specific that the foundation must have a gainful character, i.e. add to the profits of the venture. In the present definition, this course has not been taken. Inside the structure of a well-run business association it is without a doubt proverbial to expect that every part adds to the productivity of the entirety. It doesn't, obviously, follow for every situation that on the grounds that in the more extensive setting of the entire association a specific foundation has a "beneficial character" it is thus a lasting foundation to which benefits can appropriately be ascribed with the end goal of assessment in a specific domain.

Section 1 gives a general meaning of the expression "permanent establishment" which draws out its crucial attributes of a perpetual foundation in the feeling of the Convention, i.e. a particular "situs", an "altered spot of business". The section characterizes the expression "perpetual foundation" as a settled spot of business, through which the matter of an undertaking is completely or mostly carried on. This definition, subsequently, contains the accompanying conditions:

- the existence of a “place of business”, i.e. a facility such as premises or, in certain instances, machinery or equipment;
- this place of business must be “fixed”, i.e. it must be established at a distinct place with a certain degree of permanence;
- the carrying on of the business of the enterprise through this fixed place of business.

This implies typically that persons who, in somehow, are subject to the venture (personnel) conduct the matter of the undertaking in the State in which the settled spot is arranged. It could maybe be contended that in the general definition some notice ought to likewise be made of the other normal for a perpetual foundation to which some significance has once in a while been connected previously, in particular that the foundation must have a beneficial character, i.e. add to the benefits of the venture. In the present definition this course has not been taken. Inside the structure of a well-run business association it is unquestionably aphoristic to accept that every part adds to the profitability of the entirety. It doesn't, obviously, follow for every situation that in light of the fact that in the more extensive setting of the entire association a specific foundation has a "beneficial character" it is hence a lasting foundation to which benefits can legitimately be ascribed with the end goal of assessment in a specific region.

The expression "spot of business" covers any premises, offices or establishments utilized for carrying on the matter of the endeavor whether they are utilized solely for that reason. A position of business may likewise exist where no premises are accessible or needed for carrying on the matter of the venture and it basically has a certain measure of space available to it. It is insignificant whether the premises, offices or establishments are claimed or leased by or are overall at the transfer of the undertaking. A position of business may consequently be constituted by a contribute a commercial center, or by a certain for all time utilized region as a part of a traditions stop (e.g. for the capacity of dutiable products). Again the place of business may be arranged in the business offices of another venture. This may be the situation for example where the outside big business has at its consistent transfer certain premises or a part thereof claimed by the other undertaking.

As noted over, the minor truth that a venture has a certain measure of space available to it which is utilized for business exercises is sufficient to constitute a position of business. No formal legitimate right to utilize that place is accordingly needed. In this manner, for example, a perpetual foundation could exist where an undertaking wrongfully possessed a certain area where it carried on its business.

Whilst no formal lawful right to utilize a specific place is needed for that place to constitute a PE, the unimportant vicinity of an undertaking at a specific area does not so much imply that that area is at the transfer of that venture. These standards are outlined by the accompanying illustrations where agents of one endeavor are exhibit on the premises of another undertaking. A first illustration is that of a sales representative who consistently visits a real client to take requests and meets the acquiring executive in his office to do as such. All things considered, the client's premises are not at the transfer of the venture for which the salesperson is working and in this manner don't constitute a settled spot of business through which the matter of that undertaking is carried on (contingent upon the circumstances, nonetheless, section 5 could apply to consider a PE to exist).

A second sample is that of a representative of an organization who, for a drawn out stretch of time, is permitted to utilize an office in the base camp of another organization (e.g. a recently gained backup) so as to guarantee that the last organization conforms to its commitments under contracts finished up with the previous organization. All things considered, the worker is carrying on exercises identified with the matter of the previous organization and the workplace that is available to him at the central command of the other organization will constitute a PE of his manager, gave that the workplace is available to him for a sufficiently drawn out stretch of time to constitute an "altered spot of business" and that the exercises that are performed there go past the exercises alluded to in passage 4 of the Article.

A third sample is that of a street transportation venture which would utilize a conveyance dock at a client's stockroom consistently for various years with the end goal of conveying merchandise bought by that client. All things considered, the vicinity of the street transportation venture at the conveyance dock would be limited to the point that that undertaking couldn't consider that place as being busy's transfer to constitute a PE of that endeavor. A fourth sample is that of a painter who, for a long time, burns through three days a week in the vast office building of its primary customer. All things considered, the vicinity of the painter in that office building where he is performing the most critical elements of his business (i.e. painting) constitute a lasting foundation of that painter. The words "through which" must be given a wide importance to apply to any circumstance where business exercises are carried on at a specific area that is at the transfer of the endeavor for that reason.

Consequently, for occurrence, a venture occupied with clearing a street will be thought to be carrying on its business "through" the area where this action happens.

As per the definition, the place of business must be an "altered" one. Accordingly in the ordinary path there must be a connection between the spot of business and a particular land point. It is unimportant to what extent a venture of a Contracting State works in the other Contracting State on the off chance that it doesn't do as such at an unmistakable spot, yet this does not imply that the hardware constituting the place of business must be really altered to the dirt on which it stands. It is sufficient that the hardware stays on a specific site. Lasting stays on a specific site Where the way of the business exercises carried on by an undertaking is such that these exercises are regularly moved between neighboring areas, there may be troubles in figuring out if there is a solitary "place of business" (if two place of business are involved and alternate necessities of Article 5 are met, the endeavor will, obviously, have two PE). As perceived hereafter a solitary place of business will by and large be considered to exist where, in light of the way of the business, a specific area inside which the exercises are moved may be distinguished as constituting a cognizant entire industrially and topographically regarding that business.

Since the place of business must be settled, it additionally takes after that a PE can be esteemed to exist just if the place of business has a certain level of permanency, i.e. in the event that it is not of a simply impermanent nature. A place of business may, then again, constitute a PE despite the fact that it exists, practically speaking, just for a brief time of time on the grounds that the way of the business is such that it might be carried on for that brief time of time. It is in some cases hard to figure out if this is the situation. Whilst the practices took after by part nations have not been reliable in so far as time prerequisites are concerned, experience has demonstrated that changeless foundations typically have not been considered to exist in circumstances where a business had been carried on in a nation through a position of business that was kept up for under six months (on the other hand, practice demonstrates that there were numerous situations where a perpetual foundation has been considered to exist where the spot of business was kept up for a period longer than six months). One special case has been the place the exercises were of an intermittent nature; in such cases, every time of time amid which the place is utilized needs to be considered as a part of mix with the quantity of times amid which that place is utilized (which may stretch

out over various years). Another exemption has been made where exercises constituted a business that was carried on only in that nation; in this circumstance, the business may have brief time in light of its tendency however since it is completely carried on in that nation, its association with that nation is stronger. For simplicity of organization, nations may need to consider these practices when they deliver contradictions with reference to whether a specific spot of business that exists just for a brief time of time constitutes a PE.

As officially specified, interim interferences of exercises don't bring about a PE to stop to exist. Likewise, as examined in paragraph 6, where a specific place of business is utilized for just brief times of time yet such use happens routinely over drawn out stretches of time, the spot of business ought not be thought to be of a simply makeshift nature. Additionally, there may be situations where a specific spot of business would be utilized for brief times of time by various comparative organizations carried on by the same or related persons trying to dodge that the spot be considered to have been utilized for more than absolutely makeshift purposes by every specific business. The comments of section 18 on game plans expected to misapply the 12-month period accommodated in paragraph 3 would similarly apply to such cases. Where a place of business which was, at the start, intended to be utilized for such a brief time of time that it would not have constituted a PE but rather is indeed kept up for such a period, to the point that it can never again be considered as a provisional one, it turns into an altered spot of business and subsequently, reflectively, a PE. A place of business can likewise constitute a changeless foundation from its origin despite the fact that it existed, by and by, for a brief time of time, if as a result of extraordinary circumstances (e.g. passing of the citizen, venture disappointment), it was rashly sold. For a place of business to constitute a PE the venture utilizing it must portable its business completely or halfway through it. As expressed in paragraph 3 over, the action require not be of a beneficial character. Moreover, the movement require not be perpetual as in there is no intrusion of operation, however operations must be done all the time.

Where unmistakable property, for example, offices, mechanical, business or logical (ICS) gear, structures, or elusive property, for example, licenses, techniques and comparative property, are let or rented to outsiders through an altered spot of business kept up by a venture of a Contracting State in the other State, this movement will, as a

rule, render the place of business a PE. The same applies if capital is made accessible through a settled place of business. On the off chance that an endeavor of a State lets or leases offices, ICS hardware, structures or immaterial property to an undertaking of the other State without keeping up for such letting or renting action an altered spot of business in the other State, the rented office, ICS gear, building or elusive property, thusly, won't constitute a PE of the lessor gave the agreement is restricted to the negligible renting of the ICS hardware and so on. This remaining parts the case notwithstanding when, for instance, the lessor supplies staff after establishment to work the hardware gave that their obligation is restricted singularly to the operation or upkeep of the ICS gear under the course, obligation and control of the resident. In the event that the work force have more extensive obligations, for instance support in the choices with respect to the work for which the hardware is utilized, or in the event that they work, administration, examine and keep up the gear under the obligation and control of the lessor, the action of the lessor may go past the simple renting of ICS gear and may constitute an entrepreneurial movement. In such a case a PE could be esteemed to exist if the measure of permanency is met. At the point when such movement is joined with, or is comparative in character to, those said in paragraph 3, the time furthest reaches of six months applies. Different cases must be dead set by circumstances.

The matter of an endeavor is carried on mostly by the business visionary or persons who are in a paid-occupation association with the venture (staff). These faculty incorporate workers and different persons accepting directions from the endeavor (e.g. subordinate specialists). The forces of such work force in its association with outsiders are superfluous. It has no effect whether the ward operators is approved to close contracts on the off chance that he lives up to expectations at the altered spot of business. Yet a PE might in any case exist if the matter of the endeavor is carried on for the most part through programmed gear, the exercises of the staff being confined to setting up, working, controlling and keeping up such hardware. Whether gaming and candy machines and so forth set up by an undertaking of a State in the other State constitute a PE along these lines relies on upon whether the venture carries on a business action other than the introductory setting up of the machines. A PE does not exist if the endeavor simply sets up the machines and afterward rents the machines to different endeavors. A PE may exist, then again, if the venture which sets up the

machines additionally works and keeps up them for its own record. This additionally applies if the machines are worked and kept up by a specialists subject to the endeavor.

A PE starts to exist when the endeavor begins to bear on its business through a settled place of business. This is the situation once the venture plans, at the place of business, the movement for which the place of business is to serve for all time. The time of time amid which the settled place of business itself is being situated up by the venture ought not be tallied, given that this movement varies considerably from the action for which the place of business is to serve forever. The PE stops to exist with the transfer of the settled spot of business or with the suspension of any movement through it, that is the point at which all demonstrations and measures associated with the previous exercises of the PE are ended (ending up current business exchanges, upkeep and repair of offices). A provisional intrusion of operations, be that as it may, can't be viewed as a conclusion. On the off chance that the settled place of business is rented to another undertaking, it will regularly just serve the exercises of that endeavor rather than the lessors; all in all, the lessors PE stops to exist, with the exception of where he keeps carrying on a business action he could call his own through the altered place of business.

Passage 2 of the OECD Model Convention, records samples of spots that will frequently constitute a lasting foundation. Nonetheless, the procurement is not remaining toward oneself. While passage 2 notes that workplaces, plants, and so forth., are regular sorts of PE, when one is taking a gander at the operations of a specific undertaking, the necessities of section 1 must additionally be met. Section 2 accordingly just gives a sign that a PE may well exist; it doesn't give that one essentially does exist. This is additionally the position of the OECD Commentary, where it is expected that States decipher the terms recorded "in such a path, to the point that such places of business constitute PE just on the off chance that they meet the prerequisites of passage 1". Creating nations regularly wish to grow the extent of the expression "permanent establishment" and some accept that a distribution center ought to be incorporated among the particular samples. Then again, the cancellation of "conveyance" from the rejected exercises depicted in subparagraphs (an) and (b) of section 4 implies that a "distribution center" utilized for any design is (liable to the conditions in passage 1 being satisfied) a PE under the general standards of the

Article. The OECD Commentary brings up in section 13 that the expression "place of administration" is specified independently on the grounds that it is not so much an "office" and that

> “where the laws of the two Contracting States do not contain the concept of a ‘place of management’ as distinct from an ‘office’, there will be no need to refer to the former term in their bilateral convention”.

In talking about subparagraph (f), which gives that the expression "permanent establishment" incorporates mines, oil or gas wells, quarries or whatever other spot of extraction of characteristic assets, the OECD Commentary expresses that "the term 'whatever other place of extraction of regular assets' ought to be translated extensively" to incorporate, for instance, all places of extraction of hydro carbons whether on or seaward. Since subparagraph (f) does not say investigation for characteristic assets, whether on or seaward, passage 1 represents whether investigation exercises are carried on through a PE.

Section 4 rundowns various business exercises which are dealt with as special cases to the general definition set down in passage 1 and which are not PE, regardless of the fact that the action is carried on through an altered place of business. The regular highlight of these exercises is that they are, by and large, preparatory or assistant exercises. This is set down unequivocally on account of the exemption specified in subparagraph e), which really adds up to a general confinement of the extent of the definition contained in section 1. Besides subparagraph f) gives that mixes of exercises specified in subparagraphs a) to e) in the same settled place of business should be considered not to be a PE, gave that the general movement of the altered place of business coming about because of this blend is of a preparatory or helper character. Consequently the procurements of passage 4 are intended to keep a venture of one State from being exhausted in the other State, on the off chance that it carries on in that other State, exercises of a simply preparatory or helper character. Subparagraph a) relates just to the case in which an undertaking procures the utilization of offices for putting away, showing or conveying its own particular merchandise or stock. Subparagraph b) identifies with the load of stock itself and gives that the stock, thusly, might not be dealt with as a PE on the off chance that it is

kept up with the end goal of capacity, showcase or conveyance. Subparagraph c) covers the case in which a load of products or stock fitting in with one venture is prepared by a second undertaking, for, or for the record of, the initially said endeavor. The reference to the gathering of data in subparagraph d) is expected to incorporate the instance of the daily paper agency which has no reason other than to go about as one of numerous "appendages" of the guardian body; to excluded such an authority is to do close to develop the idea of "simple buy". Subparagraph e) gives that a settled spot of business through which the venture practices singularly a movement which has for the undertaking a preparatory or helper character, is esteemed not to be a PE. The wording of this subparagraph makes it pointless to create a thorough rundown of exemptions. Besides, this subparagraph gives a summed up exemption to the general definition in section 1 and, when perused with that passage, gives a more specific test, by which to figure out what constitutes a changeless foundation. To an extensive degree it constrains that definition and avoids from its somewhat wide extension various types of business associations which, in spite of the fact that they are carried on through a settled spot of business, ought not be dealt with as changeless foundations. It is perceived that such a place of business may well add to the benefit of the venture, however the administrations it performs are so remote from the genuine acknowledgment of benefits that it is hard to allot any benefit to the settled place of business being referred to. Illustrations are settled spots of business singularly with the end goal of publicizing or for the supply of data or for logical exploration or for the overhauling of a patent or an ability contract, if such exercises have a preparatory or assistant character.

It is regularly hard to recognize exercises which have a preparatory or helper character and those which have not. The definitive rule is whether the action of the settled place of business in itself shapes a fundamental and huge piece of the movement of the undertaking all in all. Every individual case will must be inspected all alone merits. Regardless, an altered place of business whose broadly useful is one which is indistinguishable to the universally useful of the entire venture, does not practice a preparatory or helper movement. Where, for instance, the adjusting of licenses and ability is the reason for an endeavor, an altered place of business of such undertaking practicing such an action can't get the advantages of subparagraph e). An altered place of business which has the capacity of dealing with a venture or even just

a piece of an undertaking or of a gathering of the worry can't be viewed as doing a preparatory or assistant movement, for such an administrative action surpasses this level. In the event that undertakings with worldwide repercussions secure an alleged "administration office" in States in which they look after auxiliaries, PE, specialists or licensees, such office having supervisory and facilitating capacities for all divisions of the venture situated inside the area concerned, a changeless foundation will typically be regarded to exist, on the grounds that the administration office may be viewed as an office inside the significance of section 2. Where an enormous universal concern has assigned all administration capacities to its local administration workplaces so that the elements of the head office of the worry are limited to general supervision (alleged polycentric ventures), the provincial administration workplaces even must be viewed as a "position of administration" inside the significance of subparagraph an) of section 2. The capacity of dealing with an endeavor, regardless of the possibility that it just covers a certain territory of the operations of the worry, constitutes a vital piece of the business operations of the venture and in this way can not the slightest bit be viewed as a movement which has a preparatory or assistant character inside the significance of subparagraph e) of passage 4.

A PE could likewise be constituted if an undertaking keeps up an altered place of business for the conveyance of extra parts to clients for apparatus supplied to those clients where, also, it keeps up or repairs such hardware, as this goes past the immaculate conveyance said in subparagraph an) of section 4. Since these after-deal associations perform a key and noteworthy piece of the administrations of an endeavor opposite its clients, their exercises are not just helper ones. Subparagraph e) applies just if the movement of the altered spot of business is constrained to a preparatory or assistant one. This would not be the situation where, for instance, the settled spot of business does give data as well as outfits arrangements and so on uniquely created for the reasons of the individual client. Nor would it be the situation if an exploration foundation were to worry about assembling. In addition, subparagraph e) makes it pass that the exercises of the settled spot of business must be carried on for the undertaking. An altered place of business which renders benefits to its endeavor as well as straightforwardly to different endeavors, for instance to different organizations of a gathering to which the organization owning the settled spot has a place, would not fall inside the extent of subparagraph e).

Another case is that of offices, for example, links or pipelines that cross the region of a nation. Aside from the way that salary determined by the proprietor or administrator of such offices from their utilization by different ventures is secured by Article 6 where they constitute enduring property under section 2 of Article 6, the inquiry may emerge with reference to whether passage 4 applies to them. Where these offices are utilized to transport property having a place with different endeavors, subparagraph a), which is confined to conveyance of merchandise or stock having a place with the undertaking that uses the office, won't be material as concerns the proprietor or administrator of these offices. Subparagraph e) likewise won't be material as worries that venture subsequent to the link or pipeline is not utilized singularly for the endeavor and its utilization is not of preparatory or assistant character given the way of the matter of that undertaking. The circumstance is diverse, be that as it may, where an undertaking claims and works a link or pipeline that crosses the domain of a nation singularly for purposes of transporting its own particular property and such transport is simply coincidental to the matter of that venture, as on account of an endeavor that is in the matter of refining oil and that possesses and works a pipeline that crosses the region of a nation exclusively to transport its own particular oil to its refinery situated in another nation. In such case, subparagraph an) eventual relevant. An extra question is whether the link or pipeline could likewise constitute a PE for the client of the administrator of the link or pipeline, i.e. the endeavor whose information, force or property is transmitted or transported starting with one spot then onto the next. In such a case, the undertaking is simply acquiring transmission or transportation administrations gave by the administrator of the link or pipeline and does not have the link or pipeline available to it. As an outcome, the link or pipeline can't be thought to be a changeless foundation of that undertaking. Subparagraph f) is of no significance for a situation where an undertaking keeps up a few settled spots of business inside the importance of subparagraphs a) to e) gave that they are divided from one another generally and organisationally, as in such a case every place of business must be seen independently and in seclusion for choosing whether a PE exists. Places of business are not "divided organisationally" where they every perform in a Contracting State integral capacities, for example, accepting and putting away merchandise in one spot, dispersing those products through another and so forth. An undertaking can't section a binding working business into a few little operations to contend that each is just occupied with a preparatory or helper movement.

The altered place of business said in passage 4 can't be considered to constitute changeless foundations so long as their exercises are limited to the capacities which are the essential for expecting that the settled place of business is not a PE. This will be the situation regardless of the fact that the agreement vital for building and carrying on the business are closed by those responsible for the spots of business themselves. The representatives of spots of business inside the significance of sectionparagraph 4 why should approved close such contracts ought not be viewed as operators inside the importance of passage 5. A for example would be an exploration establishment the supervisor of which is approved to close the agreement fundamental for keeping up the organization and who practices this power inside the system of the elements of the foundation. A PE, then again, exists if the settled place of business practicing any of the capacities recorded in paragraph 4 were to practice them not just for the benefit of the venture to which it has a place additionally in the interest of different undertakings. In the event that, for occurrence, a publicizing organization kept up by an undertaking were additionally to take part in promoting for different endeavors, it would be viewed as a lasting foundation of the venture by which it is kept up. In the event that a settled spot of business under passage 4 is esteemed not to be a PE, this exemption applies in like manner to the transfer of portable property framing piece of the business property of the spot of business at the end of the undertaking's action in such establishment. An altered place of business utilized both for exercises which rank as exemptions (paragraph 4) and for different exercises would be viewed as a single PE and assessable as respects both sorts of exercises. This would be the situation, for case, where a store kept up for the conveyance of products likewise occupied with deals.

Section 5 is a for the most part acknowledged rule that a venture ought to be dealt with as having a PE in a State if there is under sure conditions an individual representing it, despite the fact that the endeavor might not have an altered place of business in that State inside the significance of sections 1 and 2. This procurement plans to give that State the privilege to assessment in such cases. Therefore section 5 stipulates the conditions under which a venture is regarded to have a PE in admiration of any movement of an individual representing it. The section was redrafted in the 1977 Model Convention to illuminate the aim of the relating procurement of the 1963

Draft Convention without modifying its substance separated from an augmentation of the excepted exercises of the individual.

Persons whose exercises may make a PE for the endeavor are alleged dependent agents i.e. persons, whether representatives of the endeavor, who are not autonomous operators falling under section 6. Such persons may be either people or organizations and need not be occupants of, nor have a position of business in, the State in which they represent the venture. It would not have been in light of a legitimate concern for worldwide monetary relations to give that the support of any ward individual would prompt a PE for the undertaking. Such treatment is to be constrained to persons who in perspective of the extent of their power or the way of their movement include the endeavor to a specific degree in business exercises in the State concerned. Consequently, section 5 returns on the premise that just persons having the power to finish up contracts can prompt a perpetual foundation for the undertaking looking after them. In such a case the individual has sufficient power to tie the undertaking's interest in the business action in the State concerned. The utilization of the expression "permanent establishment" in this connection presupposes, obviously, that that individual makes utilization of this power over and again and not only in separated cases.

Additionally, the expression "power to finish up contracts for the sake of the venture" does not bind the utilization of the passage to an operators who goes into contracts actually for the sake of the endeavor; the section applies similarly to a specialists who finishes up contracts which are tying on the undertaking regardless of the possibility that those agreement are not really for the sake of the venture. Absence of dynamic association by an endeavor in exchanges may be demonstrative of a stipend of power to a specialists. For instance, an operators may be considered to have genuine power to finish up contracts where he requests and gets (however does not formally settle) orders which are sent specifically to a stockroom from which products are conveyed and where the outside big business routinely endorses the exchanges.

The prerequisite that an operators must "frequently" practice a power to close contracts mirrors the hidden rule in Article 5 that the vicinity which an endeavor keeps up in a Contracting State ought to be more than just brief if the undertaking is to be viewed as keeping up a changeless foundation, and in this way an assessable

vicinity, in that State. The degree and recurrence of action important to infer that the operators is "routinely working out" contracting power will rely on upon the way of the agreement and the matter of the central. It is unrealistic to set out an exact recurrence test. Regardless, the same sorts of elements considered in passage 6 eventual pertinent in making that determination. Where the prerequisites set out in passage 5 are met, a changeless foundation of the endeavor exists to the degree that the individual represents the last, i.e. not just to the degree that such an individual activities the power to finish up contracts for the sake of the endeavor. Under section 5, just those persons who meet the particular conditions may make a lasting foundation; every single other individual are barred. It ought to be borne as a main priority, in any case, that passage 5 just gives an option test of whether an undertaking has a changeless foundation in a State. In the event that it can be demonstrated that the venture has a perpetual foundation inside the importance of sections 1 and 2, it is not important to demonstrate that the individual in control is one who might fall under passage 5.

Where an undertaking of a Contracting State carries on business dealings through a specialist, general commission operators or some other specialists of a free status, it can't be exhausted in the other Contracting State in admiration of those dealings if the specialists is acting in the normal course of his business (see passage 32 above). Despite the fact that it makes sense that such an operators, speaking to a different venture, can't constitute a perpetual foundation of the outside big business, section 6 has been embedded in the Article for the purpose of clarity and accentuation. An individual will come surprisingly close to passage 6, i.e. he won't constitute a changeless foundation of the venture for whose benefit he acts just if:

a) he is independent of the enterprise both legally and economically, and

b) he acts in the ordinary course of his business when acting on behalf of the enterprise.

Whether an individual is free of the venture spoke to relies on upon the degree of the commitments which this individual has opposite the undertaking. Where the individual's business exercises for the endeavor are liable to point by point guidelines or to far reaching control by it, such individual can't be viewed as free of the

undertaking. Another vital standard will be whether the entrepreneurial danger must be borne by the individual or by the endeavor the individual speaks to. In connection to the test of lawful reliance, it ought to be noticed that the control which a guardian organization practices over its backup in its ability as shareholder is not important in a thought of the reliance or generally of the auxiliary in its ability as a specialists for the guardian. This is predictable with the standard in section 7 of Article 5. At the same time, as passage 41 of the Commentary shows, the backup may be viewed as a ward operators of its parent by utilization of the same tests which are connected to disconnected organizations. The accompanying contemplations ought to be borne at the top of the priority list when figuring out if an operators may be thought to be free. An autonomous operators will commonly be dependable to his main for the consequences of his work yet not subject to huge control as for the way in which that work is done. He won't be liable to itemized directions from the vital as to the behavior of the work. The way that the primary is depending on the uncommon expertise and learning of the specialists is an evidence of freedom.

Limits on the size of business which may be led by the operators plainly influence the extent of the specialists' power. However such limits are not significant to reliance which is dictated by thought of the degree to which the specialists practices opportunity in the behavior of business for the benefit of the primary inside the extent of the power presented by the assention.

It might be a highlight of the operation of an assention that a specialists will give considerable data to a primary regarding the business led under the understanding. This is not in itself a sufficient foundation for determination that the specialists is subordinate unless the data is given over the span of looking for support from the primary for the way in which the business is to be directed. The procurement of data which is essentially planned to guarantee the smooth running of the assention and proceeded with great relations with the chief is not an indication of reliance. Another variable to be considered in deciding free status is the quantity of principals spoke to by the specialists. Free status is more outlandish if the exercises of the operators are performed completely or entirely in the interest of stand out big business over the lifetime of the business or a drawn out stretch of time. On the other hand, this is not independent from anyone else determinative. All the actualities and circumstances must be considered to figure out if the operators' exercises constitute a self-sufficient

business directed by him in which he bears hazard and gets compensate through the utilization of his entrepreneurial aptitudes and information. Where a specialists represents various principals in the customary course of his business and none of these is transcendent as far as the business carried on by the operators legitimate reliance may exist if the principals demonstration in show to control the demonstrations of the operators sometime during his business for their benefit. Persons can't be said to act in the conventional course they could call their own business if, set up of the endeavor, such persons perform exercises which, financially, have a place with the circle of the undertaking instead of to that they could call their own business operations. Where, for instance, a commission operators not just offers the products or stock of the endeavor in his own particular name additionally chronically acts, in connection to that undertaking, as a lasting specialists having a power to close contracts, he would be esteemed in appreciation of this specific action to be a PE, since he is subsequently acting outside the standard course he could call his own exchange or business (specifically that of a commission specialists), unless his exercises are constrained to those said toward the end of section 5.

In choosing whether or not specific exercises fall inside or outside the common course of business of a specialists, one would look at the business exercises generally completed inside the operators' exchange as a merchant, commission specialists or other autonomous operators as opposed to alternate business exercises did by that operators. Whilst the examination typically ought to be made with the exercises standard to the operators' exchange, other corresponding tests might in specific circumstances be utilized simultaneously or then again, for instance where the specialists' exercises don't identify with a typical exchange.

As per the meaning of the expression "permanent establishment" an insurance agency of one State may be taxed in the other State on its protection business, in the event that it has an altered spot of business inside the importance of passage 1 or on the off chance that it carries on business through an individual inside the significance of section 5. Since offices of outside insurance agencies now and again don't meet both of the above necessities, it is possible that these organizations do expansive scale business in a State without being taxed in that State on their benefits emerging from such business. With a specific end goal to block this plausibility, different traditions closed by OECD part nations incorporate a procurement which stipulates that

insurance agencies of a State are regarded to have a PE in the other State in the event that they gather premiums in that other State through an operators built there — other than a specialists who as of now constitutes a perpetual foundation by uprightness of passage 5 — or protect dangers arranged in that region through such an operators. The choice concerning whether a procurement thusly ought to be incorporated in a tradition will rely on upon the authentic and lawful circumstance winning in the Contracting States concerned. Often, thusly, such a procurement won't be pondered. In perspective of this, it didn't appear to be prudent to embed a procurement thusly in the Model Convention.

It is by and large acknowledged that the presence of a backup organization does not, of itself, constitute that auxiliary organization a changeless foundation of its parent organization. This takes after from the rule that, with the end goal of assessment, such an auxiliary organization constitutes an autonomous legitimate element. Indeed, even the way that the exchange or business carried on by the auxiliary organization is overseen by the guardian organization does not constitute the backup organization a lasting foundation of the guardian organization.

A guardian organization might, notwithstanding, be found, under the guidelines of sections 1 or 5 of the Article, to have a PE in a State where a backup has a position of business. In this manner, any space or premises fitting in with the auxiliary that is at the transfer of the guardian organization and that constitutes a settled place of business through which the guardian carries all alone business will constitute a PE of the guardian under section 1, subject to passages 3 and 4 of the Article. Likewise, under passage 5, a guardian will be esteemed to have a changeless foundation in a State in admiration of any exercises that its auxiliary embraces for it if the backup has, and periodically works out, in that State a power to finish up contracts for the sake of the guardian, unless these exercises are constrained to those alluded to in section 4 of the Article or unless the backup demonstrations in the customary course of its business as an autonomous operators to which section 6 of the Article applies. The same standards apply to any organization shaping piece of a multinational gathering so that such an organization may be found to have a lasting foundation in a State where it has available to it and uses premises having a place with another organization of the gathering, or if the previous organization is esteemed to have a changeless foundation under passage 5 of the Article. The determination of the presence of a

changeless foundation under the guidelines of sections 1 or 5 of the Article must, in any case, be done independently for every organization of the gathering. Along these lines, the presence in one State of a PE of one organization of the gathering won't have any significance with reference to whether another organization of the gathering has itself a lasting foundation in that State. Whilst premises having a place with an organization that is an individual from a multinational gathering can be put at the transfer of another organization of the gathering and may, subject to alternate states of Article 5, constitute a perpetual foundation of that other organization if the matter of that other organization is carried on through that place, it is imperative to recognize that case from the incessant circumstance where an organization that is an individual from a multinational gathering gives administrations (e.g. administration administrations) to another organization of the gathering as a major aspect of its own business carried on in premises that are not those of that other organization and utilizing its own particular staff. All things considered, the place where those administrations are given is not at the transfer of the recent organization and it is not the matter of that organization that is carried on through that place. That place can't, hence, be thought to be a perpetual foundation of the organization to which the administrations are given. Surely, the way that an organization's own exercises at a given area may give a monetary advantage to the matter of another organization does not imply that the recent organization carries on its business through that area: unmistakably, an organization that only buys parts delivered or administrations supplied by another organization in an alternate nation would not have a PE as a result of that, despite the fact that it may advantage from the assembling of or the supplying of these services.

There has been some dialog concerning whether the unimportant use in electronic business operations of PC hardware in a nation could constitute a PE. That question raises various issues in connection to the procurements of the Article 5. The qualification between a site and the server on which the site is put away and utilized is critical since the endeavor that works the server may be not the same as the venture that carries on business through the site. PC gear at a given area might just constitute a perpetual foundation on the off chance that it meets the necessity of being settled. On account of a server, what is significant is not the likelihood of the server being moved, but rather whether it is truth be told moved. To constitute a settled spot of

business, a server will need to be situated at a certain spot for a sufficient time of time in order to end up altered inside the importance of passage 1. Another issue is whether the matter of an undertaking may be said to be entirely or incompletely carried on at an area where the endeavor has gear, for example, a server available to it. The topic of whether the matter of an undertaking is completely or part of the way carried on through such gear needs to be analyzed on a case-by-case premise, having respect to whether it can be said that, in light of such hardware, the endeavor has offices available to it where business elements of the venture are performed. A last issue is whether passage 5 may apply to consider an ISP to constitute a PE. As effectively noted, it is normal for ISPs to give the administration of facilitating the sites of different undertakings all alone servers. The issue might then emerge with reference to whether section 5 may apply to esteem such ISPs to constitute perpetual foundations of the endeavors that carry on electronic trade through sites worked through the servers claimed and worked by these ISPs. Whilst this could be the situation in extremely irregular circumstances, section 5 will by and large not be pertinent in light of the fact that the ISPs won't constitute an operators of the endeavors to which the sites have a place, in light of the fact that they won't have power to finish up contracts for the sake of these undertakings and won't consistently close such contracts or on the grounds that they will constitute free specialists acting in the normal course of their business, as confirm by the way that they have the sites of various ventures. It is likewise pass that since the site through which an endeavor carries on its business is not itself an "individual" as characterized in Article 3, passage 5 can't matter to regard a PE to exist by righteousness of the site being a specialists of the venture for purposes of that section.

The joined impact of this Article and Article 7 is that the benefits from administrations performed in the domain of a Contracting State by an endeavor of the other Contracting State are not assessable in the initially specified State in the event that they are not attributable to a lasting foundation arranged in that (the length of they are not secured by different Articles of the Convention that would permit such assessment). This outcome, under which these benefits are just assessable in the other State, is bolstered by different approach and managerial contemplations. It is reliable with the standard of Article 7 that until a venture of one State sets up a PE in another State, it ought not be viewed as taking an interest in the financial existence of that

State to such a degree, to the point that it comes extremely close to that other State. Additionally, the procurement of administrations ought to, when in doubt subject to a couple of special cases for a few sorts of administration (e.g. those secured by Article 8 and 17), be dealt with the same path as different business exercises and, along these lines, the same lasting foundation edge of levy ought to apply to all business exercises, including the procurement of free administrations.

By regarding the exercises carried on in performing the pertinent administrations to be carried on through a PE that the endeavor has in a Contracting State, the procurement permits the utilization of Article 7 and in this manner, the assessment, by that State, of the benefits attributable to these exercises. When in doubt, it is essential to guarantee that just the benefits got from the exercises carried on in performing the administrations are exhausted; whilst there may be sure exemptions, it would be negative to the cross-fringe exchange administrations if installments got for these administrations were saddled paying little respect to the immediate or roundabout costs caused with the end goal of performing these administrations. This option procurement won't matter if the administrations performed are restricted to those specified in section 4 of the Article 5 which, if performed through a settled spot of business, would not make this altered spot of business a PE under the procurements of that passage. Since the procurement alludes to the execution of administrations by the venture and this would not cover administrations gave to the endeavor itself, the majority of the procurements of section 4 would not give off an impression of being applicable. It might be, be that as it may, that the administrations that are performed are solely of a preparatory or helper character (e.g. the supply of data to planned clients when this is just preparatory to the behavior of the standard business exercises of the endeavor; see passage 23 above) and all things considered, it is sensible not to consider that the execution of these administrations will constitute a PE.

3.2 United Nations Model Convention

Article 5 of the United Nations Model Convention is based on Article 5 of the OECD Model Convention but contains several significant differences. In essence these are that under the United Nations Model Convention:

- There is a six-month test for a building or construction site constituting a permanent establishment, rather than the twelve-month test under the OECD Model Convention, and it expressly extends to assembly projects, as well as supervisory activities in connection with building sites and construction, assembly or installation projects;
- the furnishing of services by an enterprise through employees or other personnel results in a permanent establishment where such activities continue for a total of more than 183 days in any twelve-month period commencing or ending in the fiscal year concerned;
- Article 14 (Independent personal services) has been retained, whereas in the OECD Model Convention, Article 14 has been deleted, and Article 5 addresses cases that were previously considered under the "fixed base" test of that Article. As noted below (in paragraph 15.1 and thereafter), while the United Nations Model Convention has retained Article 14, the present Commentary provides guidance for those countries not wishing to have such an article in their bilateral tax agreements;
- In the list of what is deemed not to constitute a permanent establishment (often referred to as the list of "preparatory and auxiliary activities") "delivery" is not mentioned in the United Nations Model Convention, but is mentioned in the OECD Model Convention. Therefore a delivery activity might result in a permanent establishment under the United Nations Model Convention, without doing so under the OECD Model Convention;
- the actions of a "dependent agent" may constitute a permanent establishment, even without having and habitually exercising the authority to conclude contracts in the name of the enterprise, where that person habitually maintains a stock of goods or merchandise and regularly makes deliveries from the stock;
- there is a special provision specifying when a permanent establishment is created in the case of an insurance business;

consequently a permanent establishment is more likely to exist under the United Nations Model Convention approach ; and

- an independent agent acting as such will usually not create a permanent establishment for the enterprise making use of the agent because such an agent is effectively operating his own business providing a service. As compared with the OECD Model Convention, the United Nations Model Convention indicates that such an agent devoting all or nearly all their time to a particular client and not dealing with the client at an arm's length basis is not treated as having the necessary independence.

The concept of "permanent establishment" is used in bilateral tax treaties to determine the right of a State to tax the profits of an enterprise of the other State. In particular, the benefits of a venture of one State are assessable in the other State just if the endeavor keeps up a changeless foundation in the recent State and just to the degree that the benefits are attributable to the PE. The idea of PE is found in the early model traditions including the 1928 model traditions of the League of Nations. The United Nations Model Convention reaffirms the idea.

In the 1980 edition of the United Nations Model Convention,[6] the second sentence of paragraph 7 read:

> "However, when the activities of such an agent are devoted wholly or almost wholly on behalf of the enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph."

It was subsequently recognized that this sentence had given rise to anomalous situations. The concern was that if the number of enterprises for which an independent agent was working fell to one, the agent would, without further examination, be treated as dependent. In the 1999 revision of the Model, the wording was therefore amended as follows:

> "However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, and

[6] United Nations Publication: ST/ESA/102: Sales No. E.80.XVI.3

> conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered as an agent of an independent status within the meaning of this paragraph."

The revised version makes clear that the essential criterion for automatically treating an agent as not being of "an independent status" is the absence of the arm's-length relationship. The mere fact that the number of enterprises for which the independent agent acts has fallen to one does not of itself change his status from independent to dependent, though it might serve as an indicator of the absence of the independence of that agent.

3.3 Comparison

In general, the UN Model Convention preserves greater source country taxation rights in Art. 5, which addresses the economic nexus required before source country taxing rights may be exercised under the tax treaty.

Art. 5(3)(a) of the UN Model Convention has a six month duration test for building sites (as compared to twelve months in the OECD Model Convention):

> 3. The term"permanent establishment" also encompasses:
>
> (a) A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;

The OECD has for the most part moved to shorter periods before vicinity is viewed as constituting a PE in its Commentary. Whilst the practices took after by part nations have not been predictable in so far as time necessities are concerned, experience has demonstrated that lasting foundations typically have not been considered to exist in circumstances where a business had been carried on in a nation through a position of business that was kept up for under six months (then again, practice demonstrates that there were numerous situations where a changeless foundation has been considered to exist where the spot of business was kept up for a period longer than six months).

This methodology has not been reached out to building locales, be that as it may, where twelve months vicinity is still needed.

Workmanship. 5(3)(b) of the UN Model Convention addresses purported "administrations changeless foundations" in a manner that structures a reasonable line of outline between the UN and OECD approaches. The OECD Model Convention has no exceptional procurements for administrations, and late OECD work has repeated that under its Model Convention, administrations procurement is dealt with in the same route as procurement of products. As such, the same kind of financial vicinity in the region is obliged to legitimize source nation levy, a vicinity having a certain level of altered physical vicinity in that nation over a certain time of time.

The UN Model Convention viewpoint is that procurement of administrations, as with Art. 17 circumstances, has pertinently uncommon qualities, and reasonableness (between country value) to source nations manages that the typical "blocks and mortar" vicinity is not the right least financial foot shaped impression for levy of administrations by the host nation. A few OECD Member nations clearly take after this general methodology.

In the GATS connection, physical vicinity of the supplier is not a separating trademark regarding whether administrations have been given starting with one nation then onto the next. Administrations are distinctive to merchandise in this appreciation, where exchange includes the fare of products from one nation into another, and maybe this contrast between the procurement of merchandise and administrations is deficiently perceived in the OECD Model Convention.

The OECD Commentary at Para. 42.15, then again, puts a perspective held by various OECD Member nations hesitant to receive the guideline of elite home assessment of administrations that are not attributable to a PE situated in their territory but are performed in that territory:

> These States may consider that profits from services performed in a given state should be taxable in that state on the basis of the generally-accepted policy principles for determining when business profits should be considered to have their source within a jurisdiction. They consider that, from the exclusive angle

> of the pure policy question of where business profits originate, the State where services are performed should have a right to tax even when these services are not attributable to a permanent establishment as defined in Article 5. They would note that the domestic law of many countries provides for the taxation of services performed in these countries even in the absence of a permanent establishment (even though services performed over very short periods of time may not always be taxed in practice).

The OECD Commentary continues at Paras. 42.16 and 42.17:

> These States are concerned that some service businesses do not require a fixed place of business in their territory in order to carry on a substantial level of business activities therein and consider that these additional rights are therefore appropriate. 42.17 Also, these States consider that even if the taxation of profits of enterprises carried on by non-residents that are not attributable to a permanent establishment raises certain compliance and administrative difficulties, these difficulties do not justify exempting from tax the profits from all services performed on their territory by such enterprises.

There are important questions for developing countries in evaluating this OECD provision, not just on the underlying policy but also as to how it can be administered effectively. These include whether a developing country is disadvantaged vis-à-vis developed countries and the taxpayers resident in those developed countries by not being able to ascertain the (effectively worldwide) gross revenues of such a person during a particular period. This would be necessary in order to determine whether more than 50% of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in the host (i.e. non-residence) country through that individual. In the latest paper by the UN Tax Committee's subcommittee on the definition of PEs, 5 the OECD approach has been mentioned as a possibility, but is not the general approach favoured in the paper. The favoured approach effectively reflects the current UN services provision.

Another difference between Art. 5 of the UN and OECD Model Conventions is that "delivery" has been omitted from Subparas. (a) and (b) of the Para. 4 list of preparatory and auxiliary activities in the UN Model Convention. In other words, delivery alone is an activity that can constitute sufficient economic nexus to the host

country as will allow for source country taxation under the UN Model Convention, but not the OECD Model Convention. This difference reflects a view that the presence of a stock of goods for prompt delivery facilitates sales of the product and earning of profit in the host country and represents a continuous connection with the source country, and as such may constitute a PE and be subject to source country taxation. In practice, the real effect of the difference may not be great, as there is then a need to determine the amount of income properly attributable to the PE (i.e.to the delivery business alone) and that may not yield much taxable income. The Commentary to the UN Model Convention recognises that only a small amount of income would normally be allocated to a PE whose only activity is delivery. Under either Model Convention, the inclusion of delivery where there is otherwise a PE would allow source country taxation of the income of the PE as a whole, including from delivery, so the real difference is where delivery is all that happens domestically.

Under Article 5(5)(b) of the UN Model Convention there can be, in contrast to the OECD Model Convention, a dependent agent situation if the agent maintains stock, even though that agent does not conclude contracts for the principal. Similarly as for the delivery exception, this is founded upon a view that the presence of stock, and the delivery of it by the agent, constitutes a sufficient economic nexus to the host country so as to justify taxation by the host country.

Art. 5(6) of the UN Model Convention deals with some special characteristics of the insurance industry that were of concern to some countries, not only developing countries, when the UN Model Convention was developed. If an insurance agent was independent, it was considered that the profits would not be taxable to the enterprise in accordance with the provisions suggested in Art. 5(7), while if the agent was dependent, no tax could be imposed because insurance agents normally had no authority to conclude contracts as would be required under the provisions suggested in subpara. 5(a). Therefore a special provision was allowed to deem a PE to exist where an insurance enterprise “collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies”. The special provision does not apply to reinsurance, where the risk has been transferred from one insurance company to another one, presumably because in that case the link is seen as too economically remote to the source country. The special insurance provision in the UN Model

Convention is founded on the view that taxation of insurance profits in the country where the premiums were being paid was desirable and should take place independently of the status of the agent. However, such taxation is based on the assumption that the person (employee or representative) through whom premiums are collected and risk insured is present in the country where the risk is located. While some representatives involved in framing this exception were concerned about the difficulty of differentiating between agents of dependent and independent status, the case of representation through independent agents was eventually left to bilateral negotiations, which could take account of the methods used to sell insurance and other features of the insurance business in the countries concerned.

4. Tests and Rules

4.1 Basic Rule

Article 5(1) defines PE as "a fixed place of business through which the business of an enterprise is wholly or partly carried on". This is what is commonly referred to as 'basic rule PE'.

4.1.1 Objective Test

The ordinary tenet is that the place of business ought to be that of the non-resident venture and not of any other individual. The necessity is that the place of business ought to be at the transfer of the endeavor. As a culmination, what is material is the privilege to utilize the spot and not the way in which such right has been secured; i.e., whether the spot is claimed, leased or overall at the transfer of the venture. The privilege to utilize could be lawful right to utilize and authentic right to utilize. The venture ought to have the premises or offices available to it. This infers that the spot ought to be accessible to the undertakings for carrying on its business with no block. e.g. A contracted bookkeeper or Advocate were to utilize the offices of his customer, it would be far fetched whether he could be considered to have the spot available to it and subsequently, it is not liable to be considered as his PE. It might be noticed that negligible client of a position of business would not be sufficient to constitute that place as a PE since there would not be a lawful right. Be that as it may, if the contracted bookkeeper or supporter has gone into a course of action with the customer whereby the sanctioned bookkeeper or backer would handle the task from a specific place in the customer's premises, such place may be thought to be busy's transfer and hence, it might be considered to have PE. This may be so regardless of the possibility that the task being taken care of will be of that specific customer. Essentially, an individual who carries on business from a room in the house or an inn where he is staying, may additionally be considered to have PE despite that there may not be a particular understanding in the middle of him and the landowner or the inn to utilize the house or the lodging space for business, or that such client is contractually or legitimately precluded. If there should arise an occurrence of changelessness test, the

spot of business ought to have a certain level of lastingness. A spot, which is simply of a transitory nature, would not constitute a PE. Nonetheless, if the proposition when the spot of business was situated up for a genuinely long time, it could constitute PE regardless of the fact that the exercises ended after a brief time of time. The expression "permanence" ought to be seen as proceeding for an uncertain period and not something that would proceed with or keep going for ever. As such, it is redundant that the privilege to utilize the spot of business ought to be ceaseless. While there is no particular time period that would acquire "permanence", in a few nations, even a time of six months may be sufficient to constitute a PE.

4.1.2 Subjective Test

The negligible presence of a settled place of business or the responsibility for (say, office and gear) without anyone else would not be sufficient to constitute a PE. The place of business ought to really bear on business exercises. The movement performed through the spot of business ought to be the matter of the endeavor. This obliges four different tests to be fulfilled. Firstly, the action directed by the undertaking must be business under the local law of the State where the movement is performed. It ought to be recognized from other pay producing exercises or ventures. Also, regardless of the possibility that the movement is ordered under the local law of business exercises, it ought to be dealt with as business action under the Article managing business benefits (Article 7 if there should be an occurrence of UN Model Convention). Thirdly, the movement ought not be of a preparatory or assistant character which is alluded to in Article 5(4) of the Model. Fourthly, the business action must have a certain association with the place of business.

4.2 Agency Rule

Under Article 5(5) where a venture doesn't have its own particular foundation, it could have a PE through a specialists gave the accompanying tests are fulfilled. Article 5(7) accommodates an exemption to office standard PE. A venture is not considered to have a PE in the Source Country just on the grounds that it carries on business in that nation through an intermediary, general commission operators or

whatever other specialists of an autonomous status if such individual is acting in the conventional course of business. The special case specified above would, notwithstanding, not matter for a situation where the exercises of such individual are dedicated completely or entirely for the benefit of that undertaking and conditions are made or forced between that endeavors and the operators in their business and money related connection which vary from those which would have been made between two autonomous ventures.

4.2.1 Objective Test

Against the prerequisite of a place of business under the essential administer, the organization standard requires the vicinity of an operators. Any individual, whether an individual or an organization, could be an operators. It is redundant that the specialists ought to be occupant of the Source Country. The operators ought to be approved to finish up contracts for the benefit of the key. The power may be general or particular or restricted. In any case, it ought to be such that the operators' activity would tie the venture. The power ought to be as for business of the endeavor. Regularly, sales of business and arrangement of agreement that are liable to the regard of the important would not constitute organization PE. The authorisation ought to be translated in substance and not in structure. Therefore, if an operators has the power to arrange all parts of the agreement in a way, which is tying on the vital however the agreement is marked outside the Source Country, the specialists could be said to have the power to finish up contract. Under Article 5(b), office PE could start to be regardless of the fact that the operators has no power to close contracts yet he continually keeps up load of merchandise from which he consistently conveys products in the interest of the endeavor. Once more, the expression "frequently" shows that the stocking ought to be rehashed. Additionally, the expression "consistently" shows that the conveyance ought not be on an outstanding premise.

4.2.2 Subjective Test

Just specialists who are subordinate upon the essential may constitute a PE. The reliance would, by and large, be business reliance. Along these lines, certification as respects the specialists' costs, least ensured compensation, and so on would demonstrate business reliance. Another case would be a situation where the specialists has stand out essential and commits all his time to this foremost.

4.2.3 Functional Test

The power to tie the foremost ought to be for the reasons which are crucial and huge to the essential's business and not for managerial purposes, for example, finish of agreement for stationery, rent, office, cleaning or labor contracts. Simple reality that the specialists has the power to close contract would bring about organization PE. It is likewise essential that the specialists chronically practice such power. The expression "periodically" demonstrates that the power ought to be utilized over and again and not simply as a part of disconnected occurrences.

5. Position under Indian Law

BC is the Indian equivalent of PE. It is much wider in connotation and has been very effectively used by the revenue authorities to tax the income of non-residents in India. Despite being referred to in the ITA, the term was not defined till the Finance Act, 2003 inserted a somewhat cryptic explanation to Section 9 of the Indian Income Tax Act, 1961 ("ITA"). The definition of term PE was inserted in Section 92F(iiia) by the Finance Act, 2002. This definition is relevant only for the transfer pricing provisions and is an inclusive definition.

The term BC is discussed in Section 9(1)(i) of the ITA, which is reproduced below:

> 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 ……"
> Explanation 1—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 ;

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 contracts 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 for 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.
>
> Explanation 3.—Where a business is carried on in India through a person referred to in clause (a) or clause (b) or clause (c) of Explanation 2, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India.

Definition of PE under Section 92F(iiia) of the ITA, which was inserted mainly for the purposes of transfer pricing provisions reads as under :

> "Permanent Establishment", referred to in clause (iii), includes a fixed place of business through which the business of the enterprise is wholly or partly carried on.

According to area 9(1)(i) any salary earned, whether straightforwardly or in a roundabout way, through or from any BC in India, would be regarded to accumulate or emerge in India and thus would be assessable in India. However the expression "BC" has not been characterized in the ITA. In this manner rightly thus, the Bombay High Court has expressed that since the term BC concedes to no exact definition, the arrangement of the inquiry must rely on the specific truths of every case. Further, different High Courts have likewise held that there is no meaning of the words "BC" and the lawmaking body has deliberately picked expressions of wide (however indeterminate) import. Further, there is no determinative structure, in which a BC exists. As has been held by the Supreme Court[7] in a landmark case,

> "a business connection may take several forms: it may include carrying on a part of the main business or activity incidental to the main business of the non-resident through an agent, or it may merely be a relation between the business of the non-resident and the activity in India, which facilitates or assists the carrying on of that business."

[7] CIT v R D Aggarwal & Co reported in [1965] 56 ITR 20, 24

Perhaps the oldest case defining the term BC has been decided by the Rangoon High Court[8] as follows:

> The expression "business connection" must denote something, which produces profits or gains and not a mere state or condition which is favourable to the making of profit. The word "business" must have the significance indicated in section 2(13) of the Act, and the word "connection" must have been used in the sense of "that with which one is connected".

The Bombay High Court43 held that all that is necessary for a BC to exist is that there should be:

(i) a business in India;
(ii) a connection between non-resident person or company and that 'business'; and
(iii) the non-resident person or company has earned an income through such connection.

5.1 Principles of Business Connection

There are various factors, which need to be kept under consideration while determining whether a BC exists in a particular situation, or not. The landmark judgment of the Andhra Pradesh High Court[9] compiles the ratios of various other judgments and lays down the following principles of BC:

(i) Whether there is a BC between an Indian person and a non-resident is a mixed question of fact and law which has to be determined on the facts and circumstances of each case;
(ii) The expression 'BC' is too wide to admit of any precise definition; however it has some well-known attributes;

[8] CIT v Visalakshi Achi reported in [1937] 5 ITR 448
[9] G V K Industries Ltd v ITO reported in [1997] 228 ITR 564

(iii) The essence of 'BC' is the existence of close, real, intimate relationship and commonness of interest between the non-resident and the Indian person;

(iv) Where there is control or management or finances or substantial holding of equity shares or sharing of profits by the non-resident of the Indian person, the requirement of principle (iii) is fulfilled;

(v) To constitute 'BC' there must be continuity of activity or operation of the non-resident with the Indian party and a stray or isolated transaction is not enough to establish a BC.

5.1.1 Continuity

To find out BC, a standout amongst the most essential elements would be to figure out if the movement/ exchange under thought is a coincidental exchange or whether it is done by the non-occupant in a general way, which predicates a component of coherence.

> A solitary exchange would not fall inside the ambit of the BC. In the event that a producer of an engine auto in England or America offers it to a client in India, there is most likely a BC in connection to that deal between the maker and the buyer, and the maker presumably makes a benefit, however no one would propose that in appreciation of the benefit on that solitary exchange he is obligated to pay British India pay charge. There must be some component of coherence in the relationship between the gatherings, and for every situation one needs to take a gander at the specific certainties of the case to see whether it falls inside the ambit of the area.[10]
>
> If the transactions are spread over the whole year and run into several lakhs, it will be difficult, if not impossible, to resist the conclusion that such purchasing operations do constitute

[10] CIT v Metro Goldwyn Mayer (India) Ltd [1939] 7 ITR 176 (Bom)

business operations.[11] Existence of an agent is not necessary and where there is regularity and continuity of operations, there is a BC.[12]

Raw material required by a foreign company was purchased by its agents in British India continuously for several years. The sale proceeds of the manufactured goods were collected by them in British India and were credited in their books to the account of the company as they acted also as bankers. They met all the expenditure out of the collections in their hands, paid for the purchase, and made also other payments referred to in the managing agents' accounts. They were given absolute discretion with reference to the purchases as to when to buy, where to buy and at what rate. The purchase of goods continuously to meet the requirements of manufacture in the mills required skill and judgment and that is exclusively vested in the managing agents. Practically the entire management of the business was left to the agents and though it is said that they had an office also at Bangalore it is clear that most of the activities connected with the management of the business at Bangalore were carried out in British India. In view of the above, it was not difficult to hold that the foreign company did have a BC in India.[13]

It is not the length of time during which the connection has subsisted but the nature of the connection which would determine whether a BC within the meaning of this section has been established or not. A course of numerous dealings within a short time having an element of continuity about them would be sufficient to establish a BC.[14] To constitute a BC some continuity of relationship between the person in India who helps to make the profits and the person outside India who receives or

[11] Jamnadas Brij Mohan V CIT [1962] 46 ITR 233 (All)
[12] Bikaner Textile Merchants Syndicate Ltd v CIT [1965] 58 ITR 169 (Raj)
[13] Bangalore Wollen, Cotton & Silk Mills Co Ltd v CIT [1950] 18 ITR 423, 433 (Mad)
[14] Bikaner Textile Merchants Syndicate Ltd v CIT [1965] 58 ITR 169 (Raj); A P Damodara Shenoy v CIT [1954] 26 ITR 650 (Bom)

> realizes the profits, is necessary. Where all that has happened is that a few transactions of purchases of raw materials have taken place in India and the manufacture and sale of goods have taken place outside India, the profits arising from such sales cannot be considered to have arisen out of a BC in India. Where, however, there is a regular agency established in India for the purchase of the entire raw materials required for the purpose of manufacture and sale abroad and the agent is chosen by reason of his skill, reputation and experience in the line of trade, it can be said that there is a BC in India so that a portion of the profits attributable to the purchase of raw materials in India can be apportioned under the explanation (a) to section 9(1)(i).[15]

5.1.2 Real and Intimate Connection

In order to have a BC, there must be a real and intimate connection between the activity carried on by the non-resident outside India and the activity carried out in India. Further, such activity must be one, which contributes to the earnings of profits by the non-resident in his business.

> BC undoubtedly would be a commercial connection but all commercial connections will not necessarily constitute BC within the meaning of the concept unless the commercial connection is really and intimately connected with the business activity of the non-resident in India and is contributory to the earning of profits in the said trading activity.[16] To confirm with the requirements of the expression "BC" it is necessary that a common thread of mutual interest must run through the fabric of the trading activity carried on outside and inside India and the same can be described as real and intimate connection. The commonness of interest may be by way of management control or financial control or by way of sharing of profits. It may come

[15] Circular No 23, dated July 23, 1969, issued by the Central Board of Direct Taxes ("CBDT")
[16] Blue Star Engg. Co. (Bom) (P) Ltd v CIT [1969] 73 UTR 283, 291 (Bom)

into existence in some other manner but there must be something more than mere transaction of purchase and sale between principal and principal in order to bring the transaction within the purview of BC.[17]

In a case, there was no systematic purchase of goods in the taxable territories, and neither was any agency employed for selective purchases. There was also nothing to show that the assessee was able to make higher margin of profits on account of purchases in taxable territories. It was held that since no "operations" were carried out by the assessee in India either by itself or through an agent, the provisions of section 9 of the ITA were not applicable and there was no justification for apportionment of any profits attributable to the purchases effected by the assessee in India.[18] The provisions relating to BC have no application unless according to the known and accepted business notions and usages, the particular activity is regarded as a well-defined business operation. Activities, which are not well defined or are of a casual or isolated character, would not ordinarily fall within the ambit of this rule. In the instant case, the raw materials were purchased systematically and habitually through an established agency having special skill and competence in selecting the goods to be purchased and fixing the time and place of purchase. Such activity appears to be well within the import of the term 'operation'.[19]

An exporter of tobacco had appointed M/s Toshuku Ltd, a non-resident, as an agent to sell the exported tobacco in Japan for which it was entitled to commission. Even though no part of marketing operation was carried out in India the revenue treated the commission income as accrued or arisen in India as they had either accrued or arisen through and from the BC in India that

[17] CIT v Hindustan Shipyard Ltd. [1977] 109 ITR 158, 170 (AP)
[18] CIT v Jiyajeerao Cotton Mill Ltd [1979] 118 ITR 72 (Cal)
[19] Anglo French Textile Co Ltd v CIT [1953] 23 ITR 101 (SC)

existed between M/s Toshuku Ltd and the exporter in India. In this case, the Supreme Court held that the non-resident agent did not carry on any business operations in India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad did not amount to an operation carried out by M/s Toshuku Ltd in India as contemplated by clause (a) of the explanation to section 9(1)(i) of the ITA. Hence, the revenue was not right in treating the commission income as accrued in India.[20]

5.1.3 Attribution of Income

Circular No 23 issued by the CBDT is also instrumental circular in determining the attribution of income in cases where BC might exist in case of trade with non-resident entities. It states that section 9 of the ITA does not seek to bring into the tax net the profits of a non-resident, which cannot reasonably be attributed to operations carried out in India. Even if there be a BC in India, the whole of the profit accruing or arising from the BC is not deemed to accrue or arise in India. It is only that portion of the profit, which can reasonably be attributed to the operations of the business carried out in India, which is liable under the ITA. The circular also clarifies various issues on whether any income should be attributed to India where a BC might exist due to certain transactions. These situations are discussed below:

Non-resident exporter selling goods from abroad to Indian importer

The Circular states that no liability will arise on accrual basis to the non-resident on the profits made by him where the transactions of sale between the two parties, are on a principal-to-principal basis (as discussed above). The circular goes further to answer the question whether in the above type of cases there is any liability of the non-resident under section 5(1)(a) of the ITA, on the basis of receipt of sale proceeds, including the profit in India. In this regard, the circular states that if any of the following are the only operations

[20] CIT v Toshuku Ltd [1980] 125 ITR 525 (SC)

carried out by or on behalf of the non-resident in India, such receipts would not be taxed in India:

1. If the non-resident makes over the shipping documents to a bank in his own country which discounts the documents and sends them for collection to the bankers in India, who present the sight or issuance draft to the resident importer and deliver the documents to him against payment or acceptance by the latter;
2. Even if the shipping documents are not discounted in the foreign country, but are handed over in India against payment or acceptance.

5.1.4. Common Control

Where the Indian substance and the non-resident element are both held by the same individual, or have basic control, then the non-resident would be viewed as having a BC in India. This rule has been held by the Privy Council58 in an old case. All things considered, an Indian bank and an outside bank were controlled by the same persons. The principle capacity of the remote bank was to fund the Indian bank. The credits progressed by the outside bank to the Indian bank spoke to an expansive piece of the capital of the remote bank. The stream of business between the two banks was secured by the complete normal control practiced over the matter of both banks so that the advances could be made without security and for uncertain periods. The advances being referred to were made outside India through the remote branches of the separate banks and were repayable outside India, yet the funds were utilized by the Indian bank as a part of this nation. On these realities it was held that a BC existed in India between the two banks.

6. Comparison of Position in Different Countries

Australia reserves the right to treat an enterprise as having a permanent establishment in a State if it carries on activities relating to natural resources or operates substantial equipment in that State with a certain degree of continuity, or a person acting in that State on behalf of the enterprise manufactures or processes in that State goods or merchandise belonging to the enterprise. Considering the special problems in applying the provisions of the Model Convention to offshore hydrocarbon exploration and exploitation and related activities, Canada, Denmark, Ireland, Norway and the United Kingdom reserve the right to insert in a special article provisions related to such activities. Chile reserves the right to deem an enterprise to have a permanent establishment in certain circumstances where services are provided. The Czech Republic and the Slovak Republic, whilst agreeing with the "fixed place of business" requirement of paragraph 1, reserve the right to propose in bilateral negotiations specific provisions clarifying the application of this principle to arrangements for the performance of services over a substantial period of time. Greece reserves the right to treat an enterprise as having a permanent establishment in Greece if the enterprise carries on planning, supervisory or consultancy activities in connection with a building site or construction or installation project lasting more than six months, if scientific equipment or machinery is used in Greece for more than three months by the enterprise in the exploration or extraction of natural resources or if the enterprise carries out more than one separate project, each one lasting less than six months, in the same period of time (i.e. within a calendar year). Greece reserves the right to insert special provisions relating to offshore activities. Mexico reserves the right to tax individuals performing professional services or other activities of an independent character if they are present in Mexico for a period or periods exceeding in the aggregate 183 days in any twelve month period. New Zealand reserves the right to insert provisions that deem a permanent establishment to exist if, for more than six months, an enterprise conducts activities relating to the exploration or exploitation of natural resources or uses or leases substantial equipment. Turkey reserves the right to treat a person as having a permanent establishment in Turkey if the person performs professional services and other activities of independent character, including planning, supervisory or consultancy activities, with a certain degree of continuity either directly or through the employees of a separate enterprise. Canada and Chile

reserve the right in subparagraph 2 f) to replace the words “of extraction” with the words “relating to the exploration for or the exploitation”. Greece reserves the right to include paragraph 2 of Article 5 as it was drafted in the 1963 Draft Convention. Australia, Chile, Greece, Korea, New Zealand, Portugal and Turkey reserve their positions on paragraph 3, and consider that any building site or construction or installation project which lasts more than six months should be regarded as a permanent establishment. Australia reserves the right to treat an enterprise as having a permanent establishment in a State if it carries on in that State supervisory or consultancy activities for more than 183 days in any twelve month period in connection with a building site or construction or installation project in that State. Korea reserves its position so as to be able to tax an enterprise which carries on supervisory activities for more than six months in connection with a building site or construction or installation project lasting more than six months. Slovenia reserves the right to include connected supervisory or consultancy activities in paragraph 3 of the Article. 61. Mexico and the Slovak Republic reserve the right to tax an enterprise that carries on supervisory activities for more than six months in connection with a building site or a construction, assembly, or installation project. Mexico and the Slovak Republic reserve their position on paragraph 3 and consider that any building site or construction, assembly, or installation project that lasts more than six months should be regarded as a permanent establishment. Poland and Slovenia reserve the right to replace “construction or installation project” with “construction, assembly, or installation project”.

Portugal reserves the right to treat an enterprise as having a permanent establishment in Portugal if the enterprise carries on an activity consisting of planning, supervising, consulting, any auxiliary work or any other activity in connection with a building site or construction or installation project lasting more than six months, if such activities or work also last more than six months. The United States reserves the right to add “a drilling rig or ship used for the exploration of natural resources” to the activities covered by the twelve month threshold test in paragraph 3. Chile reserves the right to amend paragraph 4 by eliminating subparagraph f) and replacing subparagraph e) with the corresponding text of the 1963 Draft Model Tax Convention. Mexico reserves the right to exclude subparagraph f) of paragraph 4 of the Article to consider that a permanent establishment could exist where a fixed place of business is

maintained for any combination of activities mentioned in subparagraphs a) to e) of paragraph 4. Slovenia reserves the right to amend paragraph 6 to make clear that an agent whose activities are conducted wholly or almost wholly on behalf of a single enterprise will not be considered an agent of an independent status.

7. Conclusion

Permanent Establishment means a fixed place of business through which the business of an enterprise is partly or wholly carried on. The definition given under OECD Guidelines is an inclusive one which specifically lays down what all is included in PE and the things which are not. The PE concept marks the dividing line for businesses between merely trading with a country and trading in that country. It is generally used in the parlance of cross border business taxability of income generated. If an enterprise has a PE, its presence in a country is sufficiently substantial than when it is trading in a country.

The concept is a measuring tool to determine the right of a country to tax the profits of an enterprise which is resident of another country. PE is a term defined in tax conventions to determine when a non-resident is taxable in a source country. It defines the requisite level of nexus in a country to support taxation of income at source. Under Article 7, a Contracting State cannot tax the profits of an enterprise of the other Contracting State unless it carries on its business through a PE situated therein.

The tests required to prove any organization as a PE of an enterprise are Asset Test, Agency Test and Activities Test. Asset Test includes the capital assets such as branch, factory, work shop, mine, oil, gas well, etc of an enterprise in any country would be treated as PE. Agency Test states that the partner or a subsidiary or an enterprise would be PE of the same. Activities Test mentions storage, display, delivery, purchase and collection of information as criteria of ascertaining it as PE.

The Dissertation on Permanent Establishment covers the national regulations and international guidelines by United Nations and Organization for Economic Co-operation and Development along with cases. After analysing both the principles, it is found that OECD Guidelines are more appropriate for a country like India as the UN Model Convention is also based on OECD guidelines and some amendments.

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