

BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)
NEW DELHI

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PRESENT

Hon'ble Mr. Mr.Justice P.V.Reddi (Chairman)
Mr.A.Sinha (Member)
Mr.Rao Ranvijay Singh (Member)
- (Member)

A.A.R. NO. 789 OF 2008

Name and Address of Applicant

Cal Dive Marine Construction (Mauritius) Ltd.
Les Cascades Building, Edith Cavell Street, Port Louis Republic of Mauritius

Commissioner concerned

Director of Income-tax (International Taxation), Chennai

Present for the Department

Mr.S.B.Chakaraborthy, ITO (Intl.Taxation)-1(2), Chennai

Present for the Applicant

Mr. P.J.Pardiwalla, Sr.Advocate, Mr.R.Murlidhar, Advocate

RULING

[By Hon'ble Chairman]

1. **The applicant is a Company incorporated in Mauritius.** The following facts are stated in the application seeking advance ruling under Section 245 Q(1) of the Income tax Act, 1961 and the written submissions.

1.1. The applicant entered into an agreement on 4th December 2007 with Hindustan Oil Exploration Company Ltd. (hereafter referred to as "HOEC"), **an Indian company for laying pipelines under the sea and constructing the structures inclusive of pre-commissioning of the pipelines for a fixed and lumpsum consideration of USD 59,174,200/-.** HOEC wants to set up gas processing facility at PY-1 gas field located in the northern off-shore portion of the Kaveri basin (in the State of Tamil Nadu). Accordingly, HOEC has given the contract to the applicant to carry out the work of laying pipelines under the sea. **The work consists of transportation and installation engineering, transportation, pre-trenching, pipe laying, back filling, installation, pre-commissioning and surveys (pre-construction/pre-installation and post-installation), erection, construction, testing and handing over services. The contract for the aforesaid services/facilities will be executed both within and outside the Indian territorial waters.** The contract document is at Annexure-A to the application. The applicant will hire barges and tugs for carrying out the proposed work. **The applicant will enter into contracts with resident/non-resident contractors for supply of equipment, labour and services. Employees will be deputed to India either by the applicant or any**

other group entity in order to carry out the construction activity. The applicant will compensate the group entity for such supply of personnel. The lump sum contract price will be paid based on the progress of the work. Appendix A-1 to the contract gives the description of the milestones and the dates by which the same should be achieved. Appendix A-II to the contract gives the schedule of payments in terms of percentage of the contract price based on the progress of work.

1.2. The applicant in its written submissions dated 25/2/2009 has furnished a tabular statement containing the nature of activity ('milestone description'), the place of execution, the milestone dates specified in the agreement and the actual dates. This is in modification of the statement furnished in the original application. The items listed under the head '**milestone description**' are as follows : (1)

Confirmation/Information required as per Minutes of Interface meeting; (2) Submission of PEP, HSE & Quality Plan; (3) Completion & approval of Transportation & Installation analysis & Design of the various structures; (4) Completion of submission of approval for Installation Procedures, Drawings, Sketches, Documents, Installation aids; (5) Completion of Welding specifications, Procedures, Qualifications & Tests; (6) Completion of importation and arrival of both dredging spread at site; (7) Completion of mobilization of transportation spread to the fabrication yard in Thailand; (8) Completion of importation and mobilization of transportation spread to the coating yard in Vizag, India; (9) Completion of Pre-construction survey; (10) Completion of importation and mobilization of the DLB spread to Site; (11) Completion of Installation of Pipeline; (12) Completion of Jacket and deck installation; (13) Completion of testing of trap-to-trap Pipeline and Riser system; (14) Demobilisation of DLB Spread from Site; (15) Submission of As-Built Documentation.

1.3. The applicant has categorized the above activities into those which will be performed wholly outside India and those which will be carried out in India. **The activities listed at 1-8, 10 and 15 which relate to planning, follow-on engineering, mobilization and rig-up of equipment etc. will be performed wholly outside India, according to the applicant.** The other activities listed at sl.nos. 9 to 11 and 14 will be executed within India. **As far as item 6 to 8 and 10 are concerned, it is stated that 'most of the activity' will be outside India.** 1% of the payment will be received by the applicant on submission of the plans mentioned in item 2, the actual date of which is given as 25th July, 2008. The next payments start from the completion of importation and arrival of the dredging spread at site (item 6) which took place on 24th November, 2008. The major part of the payment i.e, 29% and 10% will be received by the applicant on completion of installation of pipeline and Jacket & Deck (items 11 and 12).

1.5. **The applicant states that during the period April to September, 2008, there have been intermittent visits of the project management team (PMT) to discuss the planning and contract issues with HOEC. The duration of each trip was 2 to 4 days. As regards the activity pertaining to item 6 above, it is stated that 6 to 8 members of PM Team arrived in India in January/February 2009 and coordinated with the Indian agent appointed by the applicant for**

the purpose of obtaining the permits, clearances and making other relevant applications to Indian authorities. The agent commenced its logistics services in Sept. 2008. It is further stated that in mid-November and December 2008, 6 to 8 members of PM team arrived in India to monitor the shore approach activities and to make preparation for pipe load out. Pre-construction survey was undertaken on 13th November 2008 which merely involved ascertaining whether the pipeline route was clear of debris and obstructions and to determine an anchor-drop pattern while laying pipes etc.

1.6. The applicant has set out in paragraph 8 of the written submissions the description of the work involved in assembling and laying pipelines, Jacket and Deck, together with the dates of commencement and completion. They are as follows :

a. The Applicant shall be provided with various components of the 14" pipelines by the client at Vizag. The Applicant is required to transport the said pipeline parts from Vizag to the site. The transportation shall be done by using barges and tugs brought from Singapore. This activity referred to at Sr.No.8 of the milestone description has commenced on 9th February 2009 and is expected to be completed by 3 March 2009.

b. The Applicant shall also be provided the Jacket and Deck by the client at a shipyard in Thailand. The said Jacket and Deck shall be transported by the Applicant from Thailand to the site. This activity referred to at Sr.No.7 of the milestone description has commenced on 6th February 2009 and is expected to be completed on 8 March 2009.

c. The Applicant will carry out (through a sub-contractor) the activity of dredging and trenching the seabed for burying the pipes therein so as to protect them from damage. The equipment required to do this activity is called the Back Hoe Dredger ("BHD") and Trailer Suction Hopper Dredgers ("TSHD") which the sub-contractor has imported from Holland/Singapore. This activity referred to at Sr.No.6 of the milestone description has commenced on 8th January 2009 and is expected to be completed on 8 March 2009.

d. The assembly of the pipelines as well as of the Jacket and Deck will be done by the Derrick Lay Barge (DLB). The DLB has welding stations where parts of the pipes will be welded and assembled to form a long pipeline. Subsequent to welding and assembling, the DLB will move forward so that the welded pipe slides over from the DLB to the sea. This process of welding the parts and DLB moving forward will continue till the entire pipe line is welded together and laid down in the sea. The assembling and laying of the pipeline will be from the shore on the east coast of India to PY-1 oil field. The DLB, not being self-propelled, moves with the help of tugs and anchors and its action is similar to the movement of a spider. The DLB will also launch, erect and pile drive the Jacket, Deck and accessories apart from assembly and laying of the pipelines into the sea bed. The clearance to the DLB to enter Indian waters was granted on 9 February 2009 and the DLB has moved to the site on 10 February 2009. The pipelines will be assembled and laid on the sea bed by 26th February 2009 while the Deck and Jacket will be assembled by the 17th March 2009.

e. The project ends by the demobilization of the DLB from the site (expected date is

23rd/31 March 2009).

f. In addition to the barges and tugs used for the transportation of pipelines, jacket and deck, there will be two barges and two tugs and one Supply cum crew boat used for the purposes of transportation of equipment, tools, crew, catering supplies etc. All vessels will be in India for short durations of time.

g. Further, in order to obtain approvals from various Indian authorities such as Customs, Naval Authorities, etc. for using the aforesaid barges and tugs in the Indian waters, about 6 to 8 project management personnel visited Chennai and Vizag in India in January and February 2009 to oversee the process for the aforesaid approvals. They were overseeing the preparatory activities for importation and clearance of the various spreads, crews, load out of parts of the pipelines.

2. On the basis of the above factual narration, the applicant submits that the project commences on 9th Feb., 2009 with the clearance given to the Derrick Lay Barge to enter Indian waters (sl.no.10 in the milestone schedule) and will conclude by or about 31st March 2009. The entire tenure of the work according to the applicant is much less than 9 months. That being the case, the applicant states that it has no 'permanent establishment' in India within the meaning of Art.5(2)(i) of the India-Mauritius DTAA.

3. The following questions are formulated for seeking the ruling of this Authority:

1. On the facts and circumstances of the case, whether the Contract Price receivable by Cal Dive Marine Construction (Mauritius) Limited (earlier known as Horizon Marine Construction (Mauritius) Limited) for laying pipelines under the sea is liable to tax in India under the provisions of the Income-tax Act and the India-Mauritius Tax Treaty?

2. If the answer to (1) is in the affirmative, in view of the provisions of section 5 of the Income-tax Act and/or Article 7 of the Tax Treaty, to what extent are the amounts reasonably attributable to the operations carried out in India and accordingly taxable in India.

3. If the answer to (1) is in the affirmative, whether the activities of Cal Dive Marine Construction (Mauritius) Limited are covered within the scope of the provisions of section 44BB of the Income Tax Act and whether Cal Dive Marine Construction (Mauritius) Limited can pay presumptive tax on the amount attributable to the operations carried out in India as prescribed under section 44BB of the Income Tax Act?

4. If the answer to (1) is in the affirmative and based on the response to questions above, whether tax at the rate of 4.223% can be withheld at source on the lumpsum contract price attributable to the operations carried out in India?

4. The first question that arises is whether the work undertaken by the applicant under the contract can be said to be construction or assembly project and if so, whether it should necessarily continue for a period of more than 9 months in order to constitute 'permanent establishment' within the meaning of Art.5. It incidentally raises the question whether the project of the applicant can be brought within the purview of para 1 of Art.5 without

reference to and without being trammelled by the test of duration laid down by clause 1 of Art.5.2.

5. For the purpose of deciding the contentious issue, let us analyze Article 5. The general concept of permanent establishment is articulated in the first and opening paragraph of Article

5. It means a fixed place of business and a place from which the business of the enterprise is wholly or partly carried on. The requirement of a fixed place and carrying on business through that fixed place connote the idea of certain degree of permanence attached to it and this very idea is inbuilt into the nomenclature – ‘permanent establishment’. Moreover, the activities must be considerable and regular. A passing, transient or casual activity, though carried out from a particular place does not fall within the scope of para 1. In some of the decisions, the criterion of ‘enduring nature’ was applied to pass the test of permanent establishment (vide CIT vs. Visakhapatnam Port Trust*). The expression ‘permanent establishment’ shall not however be interpreted in a literal sense. As observed in *Henriksen vs. Grafton Hotel Ltd.*, the word ‘permanent’ is a relative term which is not synonymous with “everlasting”. At the same time, the activities must be carried out from a fixed place regularly over a period of time irrespective of short breaks. The duration and situs of business activity, however, depends on the nature of business and its operations.

5.1. Having given a broad definition of PE in the first para, the instances of PE are enumerated in para 2 by means of an inclusive clause. Broadly speaking, para 2 of Art. 5 is complementary to the general concept of PE embodied in the opening paragraph of Art. 5. Para 2 serves the dual purpose of being explanatory and clarificatory of the concept of PE as contained in paragraph 1. By resorting to specific enumeration under Art. 5.2 of PE, the framers of the Treaty evidently wanted to clear the possible doubts and to illustratively spell out various forms of PE. Not only that, certain qualifications or parameters are laid down, for example, in clause (i) of para 2, so that the general definition of PE is not unduly stretched or restricted.

5.2. The scheme and pattern of the definition of PE in Article 5 has been explained by Ranganathan, J., thus in the ruling of this Authority in P.No. 24 of 1996, In re1: “In order to decide whether a foreign enterprise has a permanent establishment or not, the paragraphs of article 5 which define that expression have to be read together. The scheme of the article seems to be this. Paragraph 1 sets out a general definition; paragraph 2 gives an inclusive definition; paragraph 3 prescribes a limitation; paragraph 4 outlines a number of exclusions and paragraphs 5 to 7 deal with special cases where the foreign enterprise functions not directly but through some other agency in the relevant territory. For the purposes of the present applications, paragraphs 4 to 7 are not relevant. Confining one’s attention to paragraphs 1 to 3, one notices that, while the general definition and clauses (a) to (h) of the inclusive definition make no reference to any minimum period for which the permanent establishment should be in existence within the State, clause (i) of paragraph 2 does. A qualification with reference to time is also found in paragraph 3. ”

“3. A building site or construction or installation project, or an installation or drilling rig or ship used for the exploration or exploitation of natural resources. constitutes a

permanent establishment only if it lasts more than twelve months.”

5.3. Para 3 of Article 5 of the India-Netherlands Treaty referred to in that case corresponds to clause (i) of Article 5(2) of the Treaty with which we are concerned. The learned Judge then highlighted the different language employed in the India-US and the U.N. Model. At page 803, the learned Judge observed that “the words ‘permanent’ and ‘establishment’, when read with the language of paragraph 1 of article 5, connote the existence of a substantial element of an enduring or permanent nature which can be attributed to a fixed place of business in that country but the issue whether the nexus can be said to be “substantial” or “enduring” would depend entirely on the facts and circumstances of each case.”

6. It admits of no doubt that the activities of welding the pipes brought to site and laying them into the sea so as to establish connectivity from the well-head to the shore (where the gas processing facility is to be set up by HOEC) will fall within the description of both construction and assembly project. The work undertaken by the applicant which involves laying the pipelines under the sea using the barge as a construction platform is nothing but a construction project. It is also an assembly project because it involves assembling of pipelines. In this context, the applicant has placed reliance on paragraph 17 of the OECD commentary which reads thus:

“The term “building site or construction or installation project includes not only the construction of buildings but also the construction of roads, bridges or canals, the renovation (involving more than mere maintenance or re-decoration) of buildings, roads, bridges or canals, the laying of pipelines and excavating and dredging”.

6.1. Once clause (i) is attracted, the minimum period test will have to be necessarily applied. The fact that the applicant may have a project office or a workshop for the purpose of carrying out the contractual work does not bring the establishment of the applicant within the other clauses of para 2 to the exclusion of clause (i). On the other hand, clause (i) being a specific provision dealing with construction or assembly project, that provision prevails over the other clauses of para 2 of Art.5 which are general in nature. In other words, an office or workshop, if it is established as a part of or incidental to the execution of a construction or assembly project, it is clause (i) alone that comes into play. That is the only way to reconcile and avoid conflict between overlapping items/expressions contained in para 2 of Art.5.

6.2. Now, we must consider the more controversial aspect as regards the interplay of paragraph 1 and clause (i) of para 2 of Art.5. The question is whether paragraph 1 of Art.5 can be viewed on stand-alone basis without regard to clause (i) of para 2? If the project office and/or the Barge from which the applicant carries out its operations can be treated as a fixed place of business within the meaning of Art.5.1, is it still necessary that the business from such a fixed place should be carried on for a period of more than 9 months? These are the questions that should engage our attention. The argument in support of the contention that the minimum period of 9 months should not be imported into para 1 may be buttressed by the fact that para 2 purports to be an inclusive definition. An inclusive definition, normally speaking, will only expand rather than restrict the meaning and amplitude of the preceding general expression or term. In other words, it may be argued that the amplitude of para 1 cannot be cut-down by referring to the terminology of para 2. But, in our view, having regard to the contextual

setting of the two paragraphs of Article 5, too much of emphasis cannot be placed on the fact that the definition in para 2 is apparently inclusive in nature. As observed by Lord Keith in *Hemens vs. Whitsbury Farm Ltd*@..... "there can be no doubt that in some cases, the language of an 'inclusive' definition considered with the general context can have the effect that the ordinary natural meaning of a word or expression is to some extent cut down." In that case, the argument on behalf of the rate-payer that the ordinary meaning of the 'livestock' is not cut down by the word 'includes' and therefore the thorough-bred horses were also embraced within the wide meaning of livestock was rejected. The definition clause in the relevant Act defined 'livestock' as including any mammal or bird kept for the production of food or wool or for the purpose of its use in the farming of lands. Keeping the context in view, it was held that the rate-payer's buildings could not be considered as buildings used for keeping or breeding of livestock.

6.3. In our view, the inclusive definition in para 2 should not come in the way of harmonious construction or contextual interpretation of the two crucial paragraphs of Art. 5 defining the expression 'permanent establishment'. The Article has to be read as a whole, one part of it throwing light on the other. Para 1 of Art.5 cannot be viewed as a water-tight compartment without taking colour from or shedding light on various clauses of para 2, notwithstanding the 'inclusive' pre-fix contained in para 2.

*6.4. The ingredient of fixed place of business in para 1 runs through the entire gamut of para 2 while the particular instances of such fixed place which are the centres of business operations are set out in the inclusive definition with a view to dispel the doubts as well as to make it more comprehensive in scope. At the same time, if the fixed place is in the nature of a building site or a place connected with construction or assembly project, the minimum duration was advisedly prescribed by the signatories to the Treaty. Such minimum period is specified in all the Treaties without exception, though the length of period widely varies in various Treaties. If the opening para of Art.5 is to be read on stand-alone basis, then clause (i) of para 2 will be rendered ineffectual and perhaps otiose. Such construction should be avoided especially while reading and understanding a Treaty provision. It is well-settled that a strict and literal construction should be avoided in interpreting a clause in the Treaty and the intention and purpose behind the provisions incorporated in the Treaty should be given due weight. **As discussed earlier, the fact that clause (i) of para 2 is a part of inclusive definition whereas para 1 is the primary and main definition of PE does not mean that these two paras should be read distinctly, independent of each other. We reiterate that these two paras should be read harmoniously as part of the same concept. In relation to a building site and construction/assembly project, the prescribed minimum period should be read into the expression 'fixed place of business' occurring in para 1. As clarified earlier, it is implicit in the very concept of PE and the expression 'fixed place of business' that it should be in existence for a fairly long time and merely carrying on some activities intermittently or for a short while do not impress the place with the character of a fixed place through which the business of the enterprise is carried on. That being so, when clause (i) of para 2 sets out a minimum period for the continuance of the construction or installation project, it stands to reason that the said period has to be***

projected into paragraph 1 for the purpose of judging whether there is fixed place of business within the meaning of para 1. Thus clause (i) of Art.5(2) ought to be treated as a provision complementary to para 1 of Art.5.

7. The view we have expressed above is fully supported by the earlier rulings of this Authority. The ruling in P.No. 24 of 1996 [237 ITR 798, referred to earlier] is a clear authority for the proposition that a "construction, installation or assembly project cannot be treated as a permanent establishment, unless it continues for a period of more than six months² even though it might otherwise fulfill the definition contained in paragraph 1 or 2." In that ruling, the diving offshore vessel located and functioning within a definite area was treated as a fixed place of business from which the business activities were carried out; yet the existence of PE was ruled out for the reason that the time factor requirement was not satisfied.

7.1. Explaining the connotation of the phrase 'fixed place' Ranganathan, J. observed that the expression "envisages the possibility of locating, identifying or pointing out to a definite place as the place from which a business is carried on and does not import the requirement that the place of business should be stationary." The expression 'place', it was observed "refers to a portion of space and it would be more appropriate to think of a 'fixed place of business as postulating a link between the place of business and a definite geographical area or location". Elucidating the meaning of the word "fixed" the learned Judge observed that the said expression "contains in itself the indication of a time limit for the existence of the place of business. This is quite independent of specification of a time limit under clause (i) of paragraph 2 and in paragraph 3." It was then pointed out that "in relation to certain specified types of business, the Articles spell out different minimum periods necessary to consider them as permanent establishment"

7.2. It was then clarified: "even quite independent of these specific paragraphs, the expression "fixed place of business" itself imports that the place of business should exist for some reasonable period sufficient to establish a nexus with the place of operations though what that period should be, would depend on the individual facts of each case." The Authority was of the view that "the period of operations in the contracts under consideration, taken separately or even together were too short and insignificant to justify the attribution of an element of fixity to the said places of business."

7.3. Another case in which the same view was taken is the ruling in Brown & Root Inc. vs. CIT³. Rejecting the contention of the Revenue that the installation of gas pipeline falls within the scope of other clauses of Article 5 such as clause (a), (which speaks of 'place of management'), it was observed that "such plea would militate against the well established principles that a specific provision will override a general one and that the assessee/subject is entitled to invoke the provision most beneficial to him be they the provisions of a Treaty or Statute." "Since the activity falls short of 120 days, the applicant could not be said to have a PE in India. The element of permanence in relation to an establishment, if any, would be attracted under Article 5(2)(k) only if the installation project continues for a period of more than 120 days and that condition is not satisfied here."

8. The next question is whether the **construction/installation project** continues for a period beyond 9 months. It raises the issue as to how to calculate the duration of the project. **What is the starting point of the 9 month period envisaged by clause (i) of Art.5.2? According to the applicant, the time commences from the date the installation/construction activity physically begins in India and not from the date of arrival of the dredger/equipment in India. The activity of laying pipelines begins in mid-January 2009 and will go on upto April 2009. The duration of the activity will therefore be 4 months approximately, according to the applicant. Alternatively, it is contended that the 'minimum threshold period' will commence from the date the preparatory activity in relation to installation/construction begins in India. If so, the starting point of time would be from early mid-November, 2008 i.e. when the project management team members arrived in India and started the preliminary activities of clearance and logistical formalities. It is contended that the intermittent visits of the PMT members for 2 to 4 days between April and September 2008 to discuss the planning and contract issues shall be viewed as activities undertaken prior to the commencement of construction installation activity.** It is submitted that even taking a view less favourable to the applicant, the duration of the activity will commence from early November 2008 and conclude in March 2009. (In the application, the starting point is stated to be early October, 2008 as per the original schedule). The project ends by the de-mobilization of Derrick Lay Barge from the site by 31st March 2009 and thereafter there will be two barges and two tugs and one supply-cum-crew boat for short durations. The close out report will be documented in April 2009 outside India. Thus, in any case, the approximate duration of the project will not exceed 6 to 7 months, according to the applicant. In the course of arguments, it is pointed out that the threshold time will set in only when the equipments to be utilized in actual execution of work arrives and not before. Even then, the duration of project will not be anywhere near 9 months.

8.1. It seems to us that it would be too narrow a view to take if the commencement of active phase of construction/installation is held to be the starting point. The preparatory stages leading to the actual commencement of the work such as gathering the equipment and arranging the infrastructure for carrying out the work in full swing can legitimately fall within the ambit of the project duration. In this context, we may refer to the pertinent observations made and the opinion expressed by Mr. Arvid A.Skaar in the Chapter on Permanent Establishment[^].

"The specific problems arising from the "permanence test" for construction tasks deal partly with computing the length of the "duration test," i.e. the start and end of the "duration test," and the impact of interruptions. A decisive factor regarding the working period is the factual working time, including on-site planning. This applies regardless of whether or not the work has started before the contract was signed by both parties, or whether the activity is preparatory with respect to what is considered "construction work" under the construction clause. The problem is thus to decide when a construction or installation task actually starts. Some older tax-treaty commentators have held that the "12-month test" starts to run when the actual construction begins. In pre-1977 regulations, US tax authorities have assumed that the time limit starts when the work has commenced "physically." This seems to be too narrow, if interpreted to mean the

beginning of the construction work itself. Such a narrow interpretation was criticized even before the revision of the OECD model treaty. Today, it is clear that preparatory activities, for example organizing the building site itself, will trigger the time limit. Thus, it is clear that the physical start of the actual construction task is not required. This conforms best with the way the basic rule is interpreted, where a PE is established as soon as preparatory business activities are commenced in the country, provided that the activity later leads to the performance of a core business activity. A practical starting point for the time limit is the day when the first employee of the contractor arrives at the building site. If earlier, the day for the first delivery of equipment or building materials will trigger the start of the time limit. Of course, the construction work must be delimited from solely preliminary activities, such as visits on the site during the negotiations between the parties."

8.2. The learned author has succinctly stated the legal position which strikes a balance between the extreme and narrow views. As indicated by him, preparatory work for starting the project has to be distinguished from purely preliminary activities. Occasional short visits of contractor's personnel for negotiations or doing some paper work in connection with the project or for taking the soil samples, broadly speaking, will not trigger the start of the time-limit.

8.3. As regards the termination of the construction project, Mr. Skaar observed thus: **"The end of the construction project determines the end of the source state's jurisdiction over the contractor's activity. The point of departure is that the construction task is terminated when the work is completed, permanently discontinued, or the building site is permanently abandoned. The end of the "physical" work could be an alternative end of the construction period."**

9. In the present case, viewed from any angle, it is not possible to hold that the project continues for a period of more than 9 months. In paragraph 7 of the written submissions dated 25/2/2009 the applicant has stated the following facts:

During the period, April 2008 to September 2008 there have been intermittent visits by the Project Management Team (PMT) to discuss the planning and contract issues with HOEC. The duration of each trip was 2-4 days. As regards the activity listed at 6 above, 6-8 members of Project Management Team (PMT) arrived in India in January and February 2009 and co-ordinated with the agent appointed by CDMC in India for the purpose of inter alia, obtaining permits, clearances and making other relevant applications to Indian Authorities. The agent commenced its logistic services to CDMA in September 2008. Also, in early mid-November and December 2008, additional members of PMT team arrived in India to monitor the shore approach activities and prepare for pipe load out.

Pre-construction survey was undertaken on 13th November 2008 before preparing the engineering analysis plan which merely involved ascertaining whether the pipeline route was clear of any debris and obstruction. Pre-construction survey merely enabled the Applicant to determine an anchor drop pattern while laying the pipe and installation of

Jacket and Deck.

9.1. The pre-construction survey in November, 2008 and the arrival of members of PMT in mid-November 2008 to monitor the shore approach activities are the earliest events that would come within the fold of project work. Assuming that the project has been completed in all respects by the end of March or April 2009, the period will fall short of nine months. The duration will be even less, if the date of arrival of requisite equipment and mobilization of barges and tugs and pipes is to be taken into account.

9.2. The Commissioner in his comments has contended that the 'effective date' as per the Agreement should be taken as the starting point of 9 month period. The 'effective date' has been defined in the Contract document as follows :

"11.1.1 The Parties agree that this Contract shall be deemed to have become effective, be of full force and effect and the Parties shall become bound by all terms and conditions of this Contract from the Date of Signing of this Contract (the "Effective Date").

11.1.2 The Contractor agrees, represents and warrants that from Effective Date it will commence the Work in accordance with the commencement window agreed between the Parties and proceed regularly, continuously, expeditiously and diligently with the Work, notwithstanding anything to the contrary in this Contract, or any other document or instrument related thereto."

The other clauses which deserve reference are 12.1 and 12.2.

"12.1.1 Within ninety (90) days of the Effective Date, Contractor shall submit to COMPANY, for approval by COMPANY a detailed program showing how Contractor proposes to perform the Work in accordance with the Contract Schedule, as further described in Appendix-A1. (milestone description)

After COMPANY's approval of such detailed program, Contractor shall comply therewith. Such program may thereafter be modified only with COMPANY's prior written consent."

12.2.1 The Contractor will commence the work within the Commencement Window agreed between the Parties.

9.3. The argument that the starting point of time limit contemplated by clause (i) of Article 5.2 has to be reckoned from the effective date (i.e. date of signing the contract) seems to be far fetched. It even goes against the contention of the Revenue that the project operations must be deemed to have commenced in April, 2008 when the first event in the 'milestone description' (activity done outside India) took place. It would be opposed to commonsense and ground realities to hold that a date of signing the contract is the material date for computing the 9 months period. The project commencement cannot in the absence of any definite indicia be equated to be contract signing date. For instance, in clause 12.1.1. it is stipulated that within 90 days of the effective date, the contractor shall submit for approval by the company, a detailed programme of work. Thus, even preparation of the programme of work will be 90 days after the effective date. It would be absurd to say that even before such programme of work schedule is drawn up, the project commences. In any case, the preliminary work performed by the applicant outside India (item 1 to 5 of milestone description) cannot be taken into account for the purpose of identifying the starting point of time of

9 months. Thus, the starting point cannot be earlier than October, 2008 as contended by the applicant. The project, according to the dates furnished by the applicant in February, 2009, was expected to be completed in all respects by March, 2009.

10. We are, therefore, of the view that the applicant cannot be said to have permanent establishment within the meaning of para 1 of Article 5 read with clause (i) of Article 5.2 of the DTAA between India and Mauritius. When there is no permanent establishment, the question of taxing any part of the business profits in India does not arise in view of the clear provision of Article 7.1 of DTAA. It is not contended and it cannot be contended that payment received by the applicant under the contract constitutes 'fee for technical services'. Whatever technical services are provided, they were only integral to the performance of the project work.

11. On the point of PE, we would like to refer to applicant's communication dated 3rd February, 2009 addressed to this Authority wherein it was clarified that the applicant did not set up and has no intention to set up a project office in India, though initially it was planned to set up such office in mid-September, 2008 to coordinate the proposed work in India. However, the running of an office from where the coordination and supervisory activities are carried on cannot be ruled out having regard to the magnitude of the Project, though at the initial stages before the preparatory activities commenced, the office would not have been maintained.

12. As the answer to the first question is in the negative, the other questions need not be answered as suggested by the applicant's counsel. The other questions relate to the extent of attribution of income and the quantum of income on which presumptive tax under section 44BB is payable. Ruling need not be given on questions 2 and 4.

13. In the result, the first question is answered in favour of the applicant in view of the conclusion reached by us that the applicant does not have a permanent establishment on the facts stated by it. It is, however; open to the department to inquire whether the project work was closed by March-April, 2009 as anticipated by the applicant and if so upto what point of time it continued. The applicant may suo moto clarify the position to the Commissioner concerned.

Accordingly, the Ruling is given and pronounced on 26th day of June, 2009.

sd/-

sd/-

sd/-

(A. Sinha)
Member

(P.V. Reddi)
Chairman

(Rao Ranvijay Singh)
Member

F.No. AAR/789/2008

dated

This copy is certified to be a true copy of the Ruling and is sent to:

1. The applicant
2. The Director of Income-tax (International Taxation), Chennai.

(Batsala Jha Yadav)
Addl.CIT AAR(IT)