CONTENTS

| | | | PAGE |
|-----|-----------|--|------|
| | | <u>1</u> | |
| | | INTRODUCTION | |
| 1.1 | Backgro | und | 1 |
| 1.2 | | nce of Permanent Establishment | 2 |
| 1.3 | | | |
| | 1.3.1 | The framework of Article 5 in a typical bilateral tax treaty | 2 |
| | 1.3.2 | Fixed Place PE | 2 |
| | 1.3.3 | Illustrations of Fixed Place PE | 2 |
| | 1.3.4 | Construction PE and Service PE | 3 |
| | 1.3.5 | PE-Exclusion Provisions (Negative List) | 3 |
| | 1.3.6 | Dependent Agency PE | 3 |
| | 1.3.7 | PE and Related Entities | 4 |
| | | <u>2</u> | |
| | | FIXED PLACE PERMANENT ESTABLISHMENT [ARTICLE 5(1)] | |
| 2.1 | Introduc | etion | 5 |
| 2.2 | Fixed Pla | ace PE Definition in the OECD MC 2010 and UN MC 2011 | 5 |
| 2.3 | The Thre | ee Macro Elements of Fixed Place PE | 6 |
| 2.4 | Place of | Business - Four Key Features | 6 |
| | 2.4.1 | Place of Business - Feature 1 : Generally, any premises, facilities, or installation etc. | 7 |
| | 2.4.2 | Place of Business - Feature 2 : Premises etc. need not be for the foreign enterprise's exclusive use | 29 |

| CONTENTS | I-6 | |
|----------|-----|--|
| | | |

| | | | | PAGE |
|-----|------------|--------------------------|--|-----------|
| | 2.4.3 | | usiness - Feature 3 : May be owned, rented, ise at the foreign enterprise's disposal | 31 |
| | 2.4.4 | fixed place | Business - Feature 4 : For existence of a PE, human element may not be relevant of business may not be staffed with per- | 48 |
| 2.5 | "Fixednes | ss" of a plac | ee of business | 53 |
| | 2.5.1 | Geographi | c Link or Location Test | <i>54</i> |
| | 2.5.2 | The Princi Location T | ple of 'Spatial Delimitation'(Or Modified Test) | 58 |
| | 2.5.3 | Duration 7 | Гest | 63 |
| | | 2.5.3.1 | A place of business may not be regarded as "fixed", if it exists for very short duration | 63 |
| | | 2.5.3.2 | Meaning of "permanent" for the purposes of duration test | 67 |
| | | 2.5.3.3 | Six-month time threshold | 70 |
| | | 2.5.3.4 | Occasionally, 12-month period considered as time threshold for existence of a fixed place PE | 75 |
| | | 2.5.3.5 | Occasionally, duration shorter than 6 months might be sufficient for existence of a fixed place PE | 77 |
| | 2.5.4 | Fixedness | - Disposal Test | 84 |
| | | 2.5.4.1 | Disposal Test - Formal legal right not required | 85 |
| | | 2.5.4.2 | Disposal Test - Mere presence not adequate | 100 |
| 2.6 | Function | ality Aspect | ts | 122 |
| | 2.6.1 | | lity Aspects - Condition 1 : The enterprise y on business through the fixed place of | 123 |
| | 2.6.2 | | lity Aspects - Condition 2 : Whose Business on at the fixed place of business? | 135 |
| | 2.6.3 | business n | lity Aspects - Condition 3 : The place of must be used for the foreign enterprise's less activities | 167 |
| 2.7 | Start and | | ted Place PE | 176 |
| 2.8 | Conclusion | | | 179 |

I-7 CONTENTS

| | | PAGE |
|------|--|------|
| | <u>3</u> | |
| | PE ILLUSTRATIVE PROVISIONS [ARTICLE 5(2)] | |
| 3.1 | Introduction | 181 |
| 3.2 | Art. 5(2) in the OECD MC 2010 and the UN MC 2011 | 181 |
| 3.3 | Relationship between Art. 5(1) and Art. 5(2) | 182 |
| 3.4 | Place of Management | 188 |
| 3.5 | Branch | 194 |
| 3.6 | Office | 196 |
| 3.7 | Factory | 198 |
| 3.8 | A mine, an oil or gas well, a quarry or any other place of extraction of natural resources | 199 |
| 3.9 | Warehouse | 200 |
| 3.10 | Art. 5(2) <i>vis-à-vis</i> an installation/structure for exploration/exploitation of natural resources | 202 |
| 3.11 | Conclusions | 204 |
| | CONSTRUCTION PE AND SERVICE PE - [ARTICLE 5(3)] | |
| 4.1 | Introduction | 205 |
| 4.2 | Art. 5(3) in the OECD Model Convention 2010 and the UN Model Convention 2011 | 206 |
| 4.3 | Scope and intricacies of construction PE clauses in the | |
| | OECD MC 2010 and the 2011 | 206 |
| 4.4 | Building Site, Construction or Installation Project | 208 |
| 4.5 | Multiple Projects and Construction PE Threshold : Standalone or Aggregate Approach? | 211 |
| 4.6 | Project Duration : Commencement, Conclusion and Interruptions | 228 |
| 4.7 | Spatial De-limitation | 238 |
| 4.8 | Art. 5(3) versus Art. 5(1) | 238 |
| 4.9 | Art. 5(3) versus Art. 5(2) | 247 |
| 4.10 | Construction PE and Pre-PE Offshore Activities | 253 |
| 4.11 | Sub-contractor - Implications to Main Contractor | 256 |
| 4.12 | Project Office and Construction PE | 260 |
| 4.13 | Deputation of Personnel to Construction Projects | 262 |
| 4.14 | Passive Joint Venture & Construction PE | 264 |

| | | CONTENTS | I-8 |
|------------|---|--|------|
| | | | PAGE |
| 4.15 | Planning | g & Supervision | 265 |
| 4.16 | Service | PE | 268 |
| 4.17 | Conclusi | ions | 282 |
| Annex | | nstruction PE and service PE provisions in select a treaties | 284 |
| | | <u>5</u> | |
| | | PE EXCLUSION [ARTICLE 5(4)] | |
| 5.1 | Introduc | ction | 300 |
| 5.2 | Article 5 | (4) in the OECD MC and the UN MC | 300 |
| 5.3 | Scope of | f Article 5(4) | 301 |
| 5.4 | The cent | tral principle underlying Article 5(4) | 302 |
| 5.5 | Preparat | tory or auxiliary activities versus core business | 302 |
| 5.6 | | ace of Business for serving other entities | 302 |
| 5.7 | | (4)(a): Use of facilities solely for the purpose of stor- | 300 |
| | | lay or delivery of goods or merchandise belonging to | 310 |
| 5.8 | chandise | (4)(b): The maintenance of stock of goods or mere belonging to the enterprise solely for the purpose of display or delivery | 321 |
| 5.9 | dise belo | (4)(c): Maintenance of a stock of goods or merchanonging to the enterprise solely for the purpose of propose another enterprise | 329 |
| 5.10 | solely for | (4)(<i>d</i>): The maintenance of a fixed place of business r the purpose of purchasing goods or merchandise (or purpose of collecting information) for the enterprise | 330 |
| 5.11 | for the p | (4)(e): Maintenance of a fixed place of business solely purpose of carrying on, for the enterprise, any other of a preparatory or auxiliary character | 343 |
| | 5.11.1 | Applicability in case of 'preparatory or auxiliary' activities | 343 |
| | 5.11.2 | Could a PE-exclusion provision apply to a project office? | 357 |
| | 5.11.3 | Representative/Liaison Office | 359 |
| 5.12 | solely for graphs (a vention, business | (4)(f): The maintenance of a fixed place of business r any combination of activities mentioned in sub-paraa) to (e) of Article 5(4) of the OECD 2010 Model Conprovided that the overall activity of the fixed place of resulting from this combination is of a preparatory | |
| | | ary character | 365 |
| 5.13 | Conclusi | ion | 366 |

I-9 CONTENTS

| | | | | PAGE |
|-----|-----------------|------------------------|---|------|
| | | DEPEN | <u>6</u> DENT AGENCY PERMANENT ESTABLISHMENT | |
| 6.1 | Introdu | ction and si | ignificance | 367 |
| 6.2 | Depend | lent agency | PE under the OECD Model | 367 |
| 6.3 | Position | ı in bilateral | Tax Treaties | 369 |
| 6.4 | Depend | lent Agency | - From the perspective of the agent | 369 |
| 6.5 | Pre-req | uisites for d | lependent agency PE | 371 |
| | 6.5.1 | Agent act foreign e | ts in the source state, on behalf of the nterprise | 371 |
| | 6.5.2 | _ | to conclude contracts | 380 |
| | | 6.5.2.1 | The agent must have an authority to conclude contracts | 380 |
| | | 6.5.2.2 | The agent may have implied authority to conclude contracts | 398 |
| | | 6.5.2.3 | Implications in case of "commissionaire" arrangements | 406 |
| | 6.5.3 | Legal and | d/or economic dependence | 410 |
| | 6.5.4 | Habitual | exercise of the authority | 412 |
| | 6.5.5 | Mere par not adeq | ticipation/attendance in the negotiations is uate | 414 |
| 6.6 | Indepe | ndent Agent | | 415 |
| | 6.6.1 | Provision | s in the model conventions | 415 |
| | 6.6.2 | Legal and | d Economic Independence | 416 |
| | 6.6.3 | Ordinary | Course of Business | 426 |
| 6.7 | ing dep | | tional Investors (FIIs) be regarded as hav- ncy PE on account of services of brokers | 434 |
| 6.8 | Conclu | | | 437 |
| | | | gency PE provisions in Indian tax treaties | 440 |
| | | | 7 | |
| | P | ERMANE | NT ESTABLISHMENT THROUGH RELATED ENTITIES | |
| 7.1 | | ction and si | S | 444 |
| 7.2 | Article 2011 | 5(7) in OEC | D MC 2010 and Article 5(8) of the UN MC | 444 |

| | CONTENTS | I-10 |
|-----|--|------|
| | | PAGE |
| 7.3 | The objective behind Article 5(7) in OECD MC 2010, Article 5(8) of the UN MC 2011 and similar provisions in bilateral tax treaties | 445 |
| 7.4 | A foreign enterprise may have a fixed place PE (in the premises of a subsidiary or related entity in a source state) | 448 |
| 7.5 | A foreign enterprise may have a dependent agency PE through a subsidiary in the source state | 451 |
| 7.6 | Could a subsidiary's independent (legal) status be disregarded for determining whether a foreign enterprise has a PE in a source state? | 452 |
| 7.7 | Conclusion | 455 |
| | APPENDIX ONE : INDIAN COURTS CASES | |
| | madeus Global Travel Distribution S.A. v. Deputy Commissioner Income-tax, Non-resident Circle [2011] 11 taxmann.com 153 | |
| | Pelhi) | 457 |
| No | alileo International Inc. v. Deputy Commissioner of Income-tax, on-Resident Circle, New Delhi [2008] 19 SOT 257 (Delhi) | 468 |
| In | Vestern Union Financial Services Inc. v. Assistant Director of acome-tax, Circle 2(1), International Taxation [2007] 104 ITD [University International Interna | 482 |
| | eagate Singapore International Headquarters (P.) Ltd., <i>In re</i> 010] 189 Taxman 181 (AAR - New Delhi) | 491 |
| ♦ G | olf in Dubai, <i>In re</i> [2008] 174 Taxman 480 (AAR - New Delhi) | 494 |
| (O | ugro Engineers B.V. v. Assistant Commissioner of Income-tax OSD), Range-I, Dehradun [2008] 26 SOT 78 (Delhi) | 499 |
| No | otorola Inc. v. Deputy Commissioner of Income-tax, on-Resident Circle [2005] 95 ITD 269 (Delhi)(SB) | 502 |
| 23 | an Oord Atlanta B.V. v. Assistant Director of Income-tax [2008] B SOT 29 (Kol.)(URO) | 536 |
| D | eputy Director of Income-tax (International Taxation) <i>v.</i> Dharti redging & Infrastructural Ltd. [2011] 44 SOT 586 (Hyd.) | 539 |
| | eputy Commissioner of Income-tax, Non-resident Circle, New elhi v. Perfetti SPA [2008] 19 SOT 433 (Delhi) | 543 |
| G | eputy Director of Income-tax, (II)-2(1), Mumbai <i>v.</i> Tekmark lobal Solutions LLC [2010] 38 SOT 7 (Mum.) | 549 |
| C | ommissioner of Income-tax, Dehradun v. BKI/HAM v.o.f. o Arthur Anderson & Co. [2011] 15 taxmann.com 102 ottarakhand) | 551 |
| (Iı | hirlpool India Holdings Ltd. v. Deputy Director of Income-tax nternational Taxation), Circle 2(2), New Delhi [2011] 10 xmann.com 31(Delhi) | 553 |
| | | |

I-11 CONTENTS

| | | PAGE |
|---|---|------|
| • | R&B Falcon Offshore Ltd. v. Additional Commissioner of Income-tax, Range-I, Dehradun [2010] 42 SOT 432 (Delhi) | 557 |
| | Steel Authority of India Ltd. v. Assistant Commissioner of Income-tax, Circle 23(2), New Delhi [2007] 105 ITD 679 (Delhi) | 559 |
| • | J. Ray McDermott Eastern Hemisphere Ltd. v. Joint Commissioner of Income-tax-Special Range 21, Mumbai [2010] 39 SOT 240 (Mum.) | 562 |
| • | Assistant Director of Income-tax (International Taxation), Circle-2(2), Mumbai v. Valentine Maritime (Mauritius) Ltd. [2011] 45 SOT 34 (Mum.) | 570 |
| • | Cal Dive Marine Construction (Mauritius) Ltd. v. Director of Income-tax (International Taxation), Chennai [2009] 182 Taxman 124 (AAR - New Delhi) | 581 |
| • | Brown & Root Inc. v. Commissioner of Income-tax [1999] 103 Taxman 515 (AAR - New Delhi) | 585 |
| • | Deputy Director of Income-tax (International Taxation)-2(1) v. Stock Engineer & Contractors B.V. [2009] 27 SOT 452 (Mum.) | 588 |
| • | Pintsch Bamag, In re [2009] 184 Taxman 122 (AAR - New Delhi) | 593 |
| | Hyosung Corporation v. Director of Income-tax (International Taxation), New Delhi [2009] 181 Taxman 270 (AAR - New Delhi) | 598 |
| • | Sumitomo Corpn. v. Deputy Commissioner of Income-tax, S.R.V., New Delhi [2008] 114 ITD 61 (Delhi) | 605 |
| • | UAE Exchange Centre, <i>In re</i> [2004] 139 Taxman 82 (AAR - New Delhi) | 613 |
| • | Airlines Rotables Ltd. v. Joint Director of Income-tax (International Taxation) [2011] 44 SOT 368 (Mum.) | 618 |
| • | ADIT, Circle 3(2) v . M. Fabrikant & Sons Ltd. [2011] 9 taxmann.com 286 (Mum.) | 626 |
| • | Columbia Sportswear Co., <i>In re</i> [2011] 12 taxmann.com 349 (AAR - New Delhi) | 628 |
| • | Pioneer Overseas Corporation v. Deputy/Assistant Director of Income-tax, Circle-2(1), International Taxation, New Delhi [2010] 37 SOT 404 (Delhi) | 637 |
| • | Morgan Stanley & Co. International Ltd., <i>In re</i> [2005] 142 Taxman 630 (AAR - New Delhi) | 652 |
| • | Deputy Commissioner of Income-tax, (OSD), Range-1, Dehradun v. Hyundai Heavy Industries Co. Ltd. [2009] 31 SOT 482 (Delhi) | 658 |
| • | Van Oord Atlanta B.V. v. Assistant Director of Income-tax [2008] 23 SOT 29 (Kol.)(URO) | 662 |
| • | Tekniskil (Sendirian) Berhad <i>v.</i> Commissioner of Income-tax [1996] 88 Taxman 439 (Delhi) | 664 |
| • | K.T. Corporation, In re [2009] 181 Taxman 94 (AAR - New Delhi) | 668 |
| • | Assistant Commissioner of Income-tax v. DHL Operations B.V. [2005] 142 Taxman 1 (Mum.) (Mag.) | 670 |

| CONTENTS | I-12 |
|--|------------------|
| | PAGE |
| ◆ Laird Technologies India (P.) Ltd., <i>In re</i> [2010] 188 Taxman 304 (AAR - New Delhi) | 680 |
| ◆ Deputy Director of Income-tax, (International Taxation)-1(2), Mumbai v. Daimler Chrysler A.G. [2010] 39 SOT 418 (Mum.) | 688 |
| ◆ TVM Limited v. Commissioner of Income-tax [1999] 102 Taxman 578 (AAR - New Delhi) | 693 |
| ◆ Income-tax Officer (IT) 2(1), Mumbai v. Salil Sevantilal Shah [2011] 45 SOT 64 (Mum.)(URO) | 700 |
| ◆ Speciality Magazines (P.) Ltd., <i>In re</i> [2005] 144 Taxman 153 (AAR - New Delhi) | 702 |
| ◆ XYZ/ABC Equity Fund v. Commissioner of Income-tax [2001] 116 Taxman 719 (AAR - New Delhi) | 706 |
| ◆ Director of Income-tax (International Taxation) v. Morgan Stanley & Co. [2007] 162 Taxman 165 (SC) | 714 |
| APPENDIX TWO: FOREIGN COURTS CASES | S |
| ◆ Inez de Amodio <i>v.</i> Commissioner of Internal Revenue [2012] 18 taxmann.com 205 (TC - US) | 724 |
| ◆ Toronto Blue Jays Baseball Club v. The Minister of Finance [2012] 18 taxmann.com 206 (CA - Ontario) | 728 |
| ◆ Secretary for Inland Revenue <i>v.</i> Downing [2012] 18 taxmann.co 207 (South Africa) | om <i>732</i> |
| ♦ Her Majesty The Queen v. William A. Dudney [2012] 18 taxmann.com 208 (FC - Canada) | 739 |
| ◆ Joseph Fowler v. Minister of National Revenue [2012] 18 taxmann.com 209 (TC - Canada) | 743 |
| ◆ Elizabeth Herbert v. Commissioner of Internal Revenue [2012] 18 taxmann.com 210 (TC - USA) | 746 |
| ◆ Knights of Columbus v. Her Majesty the Queen [2012] 18 taxmann.com 211 (TC - Canada) | 748 |
| ◆ National Westminster Bank, PLC v. The United States [2012] 18 taxmann.com 212 (CFC - USA) | 758 |
| ◆ Sunbeam Corporation (Canada) Ltd. v. Minister of National Revenue [2012] 18 taxmann.com 213 (SC - Canada) | 767 |
| ◆ Taisei Fire & Marine Ins. Co., Ltd., et al v. Commissioner of | |
| Internal Revenue [2012] 18 taxmann.com 214 (TC - US) ◆ Minister of National Revenue v. Tara Exploration and | 771 |
| Development Co. Ltd. [2012] 18 taxmann.com 215 (SC - Canada) | 777 |
| ◆ American Income Life Insurance Company v. Her Majesty the Queen [2012] 18 taxmann.com 204 (TC - Canada) | 778 |
| ◆ Dell Products v. State [2011] 16 taxmann.com 414 (SC - Norway | 787 |