IN THE INCOME TAX APPELLATE TRIBUNAL
"L" Bench, Mumbai
Before Shri B.R. Baskaran (AM)& Shri Pawan Singh (JM)

I.T.A. No. 1096/Mum/2010 (Assessment Year 2003-04)
I.T.A. No. 5492/Mum/2014 (Assessment Year 2004-05)
I.T.A. No. 5493/Mum/2014 (Assessment Year 2005-06)
I.T.A. No. 5494/Mum/2014 (Assessment Year 2006-07)
I.T.A. No. 5495/Mum/2014 (Assessment Year 2007-08)

DDIT(IT)-1(1) Room No. 117 Scindia House 1st Floor Ballard Estate N.M. Road Mumbai-400 038.	Vs.	M/s. ARC Line (Mauritius) C/o. Freight Connection India Pvt. Ltd. 3rd Floor, 3C Omar Esquare, Sion- Chunnabhatti Junction Sion Trombay Road, Sion Mumbai-400 022.
(Appellant)		(Respondent)

I.T.A. No. 5122/Mum/2003 (Assessment Year 1998-99)
I.T.A. No. 5516/Mum/2006 (Assessment Year 1999-2000)
I.T.A. No. 5517/Mum/2006 (Assessment Year 2000-01)
I.T.A. No. 2456/Mum/2005 (Assessment Year 2001-02)
I.T.A. No. 3770/Mum/2006 (Assessment Year 2002-03)
I.T.A. No. 1507/Mum/2008 (Assessment Year 2003-04)
I.T.A. No. 4414/Mum/2009 (Assessment Year 2004-05)
I.T.A. No. 81/Mum/2010 (Assessment Year 2005-06)
I.T.A. No. 82/Mum/2010 (Assessment Year 2006-07)
I.T.A. No. 3793/Mum/2010 (Assessment Year 2007-08)
I.T.A. No. 384/Mum/2012 (Assessment Year 2008-09)
I.T.A. No. 6236/Mum/2014 (Assessment Year 2009-10)
I.T.A. No. 6237/Mum/2014 (Assessment Year 2010-11)
I.T.A. No. 6238/Mum/2014 (Assessment Year 2011-12)
I.T.A. No. 5115/Mum/2016 (Assessment Year 2012-13)

M/s. ARC Line(Mauritius) C/o. Freight Connection India Pvt. Ltd. 3rd Floor, 3C Omar Esquare, Sion- Chunnabhatti Junction Sion Trombay Road, Sion Mumbai-400 022.	Vs.	DDIT(IT)-1(1)/ DCIT, Circle-2(1) Mumbai.
(Appellant)		(Respondent)

PAN : AADCA0878J

Assessee by	S/Shri Harsh Kothari, Jigar Saiya & Kunal Shah
Department by	Shri M.V. Rajguru
Date of Hearing	22.02.2018
Date of Pronouncement	07.03.2018

O R D E R

Per Bench :-

The appeals filed by the assessee relate to quantum assessment proceedings and are directed against the orders passed by the learned CIT(A)-31, Mumbai and they relate to A.Ys. 1998-99 to 2012-13. The appeals filed by the revenue relate to penalty proceedings relating to AY 2003-04 to 2007-08, wherein the revenue is challenging the decision of Ld CIT(A) in deleting the penalty levied u/s 271(1)(c) of the Act. All these appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. We shall first take up the appeals filed by the assessee. The assessee is a shipping company incorporated in Mauritius. In all the years under consideration, the assessee declared income from shipping activities, but claimed it as exempt under provisions of DTAA by taking support of Article-8 of DTAA entered between India and Mauritius. The Assessing Officer, however, held that Article-8 of Indo Mauritius DTAA will apply only if place of effective management is situated either in India or Mauritius. The Assessing Officer gave finding that the place of effective management is located in gulf countries and hence Article-8 will not apply. In this regard he took support of the view expressed by Learned Expert on International Taxation Mr. Klaus Vogel.

3. The Assessing Officer further noticed that the assessee had appointed an Indian company named M/s. Freight Connection (India) Pvt. Ltd. as its agent. The Assessing Officer took the above said Indian company as agency PE of the assessee. The AO also held that the business premises of M/s Freight

Connection (India) P Ltd also constitutes Fixed place PE of the assessee. Accordingly the AO held that the assessee is having PE in India within the meaning of Article-5 of DTAA and accordingly brought income of the assessee to tax under Article-7 of the Indo-Mauritius DTAA under the head "Business". The learned CIT(A) also confirmed the same and hence the assessee has filed these appeals.

4. The original Grounds and additional grounds urged by the assessee give rise to following common issues:-

(a) Whether tax authorities are right in law in holding that Article-8 of Indo-Mauritius DTAA would not apply to the assessee.
(b) Whether Freight Connection (India) Pvt. Ltd. would constitute agency PE of the assessee.
(c) Whether place of business of Freight Connection (India) Pvt. Ltd. constitute fixed place PE in the hands of the assessee.
(d) Whether the Assessing Officer was justified in computing income of the assessee u/s. 44B of the Act.

5. At the time of hearing, learned AR submitted that identical issues were considered in another case named M/s. Bay Lines (Mauritius) by the co-ordinate bench in ITA No.1181/Mum/2002 and others and the Tribunal, vide its order dated 20-02-2018, has decided all the above said issues. Accordingly he submitted that the all the issues cited above are covered by the order passed in the case of M/s Bay Lines (Mauritius) (supra). The Learned DR also agreed with the submission so made by the Ld A.R.

6. We heard the parties and perused the record.

7. The first common issue relates to applicability of Article-8 of Indo-Mauritius DTAA to the assessee. As observed earlier, the assessee claimed that its place of effective management is located in Mauritius and hence as per Article 8, no income is taxable in India. However, the AO gave a finding that the Place of effective management is located in Gulf Countries. Accordingly he held that the Article 8 will not apply, since the Place of effective management is not located either in India or in Mauritius. This issue has been decided against

the assessee by the Coordinate Bench in the case of Bay Lines (Mauritius) (supra). For the sake of convenience, we extract below the operative portion of the order:-

> *"Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A) which is contained in para no. 2 & 3 in its order. The operative portion of the order of Ld. CIT(A) contained in para no. 3, 3.1 & 3.2 of its order and the same is reproduced below:-*
>
> > *"3. I have considered the submission of the appellant counsel carefully and the order of the A.0 The first limb of the argument of Mr.Dinesh Kanabar is about the effective management which is based on Article 4 of the DTAA. According to Article 1 the convention shall apply to a person who are resident of one or both of the contracting state The Article 4 defines resident. The Article 4(3) provides a formula where there is a tiebreaker i.e. if the person is resident in both the contracting state his status-of his residence in a particular contracting state is to be decided as per article 4(3) of the DTAA. The article 4(3) does not define the effective management i.e. not vice versa, in the present case relying' on different decisions, Mr. Dinesh Kanabar had tried to prove that the effective management of the appellant is in Mauritius because the appellant is a resident of Mauritius. In my opinion, it is not a correct definition nor proper way to come to a conclusion of effective management of the company. In the present case there is no dispute that the appellant is a resident of Mauritius and as per Indian Income tax Act, non-resident in India. Therefore there is no necessity to consider the different ruling of the Advance Authority-Ruling as cited above, The Advance Rulings are not binding to other assessee except the case in which the Acveszc6 Ruling have given their findings. There is a separate article in convention which indicates that there can be effective management other than two contracting state. Article 8(1) and 8(2) read as:*
> >
> > > *"(1) Profits from the operation of ships or aircraft in international traffic stall be taxable only in Contracting State in which the place of effective Management of the enterprise is situated.*
> > >
> > > *(2) If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated or, if there is no Such home harbour, in the*

Contracting State of which the operator of the ship is a-resident."

3.1. Thus there is a possibility of effective management other than the contracting state. In the earlier paragraph, Mr. Dinesh Kanabar himself had admitted that the appellant has been granted Tax Residency Certificate of Mauritius after satisfying-certain conditions as mentioned in para.

3.2 It is also a known fact that the shareholders are of UAE residence i.e. Reis Brothers. The other directors are only on the Company's board only to satisfy the conditions of the Mauritius Government. In the board minutes which have been produced before me, it is Found that all the decisions have been left out to the UAE agent arid -are of routine nature. In fact from the assessment order it is found that the main agent M/s Freight Connection (I) Pvt. Ltd. in India was appointed as an agent on 20-6-1995 on a letter head showing its address as Dubai, UAE. A letter dated 12-4-2000 from M/s Baylines addressed to A.O. also originated from Dubai. All these indicate that though the company was registered in Mauritius but the major policy decisions were taken at the UAE. Thus., in my opinion, the place of effective management is the place where the key and commercial-decisions that are necessary for the business or in substance the place of effective management will originally be a place where the most senior person or a group of persons make its decisions, the place where the action to be taken is an entity as a whole or determined. In view of the above fact, I too, feel that the effective management of the appellant is neither in Mauritius nor in India. Mr. Klaus Vogel in his book-of International Taxation, who is an eminent authority of International taxation has stated that if the effective management of enterprise is not in one of the Contracting States, but is situated in the third state, the benefit of the article & cannot he extended. The same is reproduced as below:-

"Article 8 furthermore applies only when the enterprises place of effective management is situated in a contracting State. Whenever it is situated in a third 'State: the relationship between the two contracting States is governed by the permanent establishment principle laid down in Article 7. In a case in which the OTC article corresponding to Article 8 MC established that an exemption of income was dependent on the airplane being registered in the other contracting State, but where it was registered in the USA, the I.R.S. likewise applied the treaty provision/Corresponding to Article 7 instead (LTR 9513008: DTC USA/Ireland).

3.3 Thus the argument of Mr. Dinesh Kanabar that the effective management can be only in between two contracting state is not correct. Accordingly, I hold that the effective management of the appellant is neither in Mauritius nor in India but in a third country. Accordingly, the appellant is not entitled for the benefit of Article 8 of the DTAA."

After having gone through the facts of the present case, arguments addressed by both the parties, judgment cited before us and orders passed by the revenue authorities, we find that the effective management can be only in between two contracting state is not correct and as per the facts narrated above, we are of the considered view that the effective management of the assessee is neither in Mauritius nor in India and we are in agreement with the views of Mr. Klaus Vogel, who is an eminent authority of International Taxation, that if the effective management of an enterprise is not in one of the contracting state, but is situated in the third state, the benefit of article-8, cannot be extended.

No new facts or contrary judgments have been brought on record before us by the Ld. AR in order to controvert or rebut the findings recorded by the Ld.CIT (A). Moreover, there are no reasons for us to deviate from the findings so recorded by the Ld. CIT (A). Therefore, we are of the considered view that the findings recoded by the Ld. CIT (A) are judicious and are well reasoned. Accordingly, we uphold the same. Resultantly, this ground of cross objection raised by the assessee stands ***dismissed.***

8. The facts being identical in the instant case also, consistent with the view taken by the Tribunal in the above cited case, we decide this issue against the assessee.

9. The Next common issue is whether there exists any Agency PE or Fixed place PE in India. Identical issues were considered in the case of Bay Lines (Mauritius) (supra) and these issues have been decided in favour of the assessee by the Coordinate Bench vide para 14 of its order as under:-

14. We have heard counsels for both the parties and we have also perused the material placed on record as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A) which is contained in para no.

4 & 5 in its order. The operative portion of the order of Ld. CIT(A) contained in para no. 5 of its order and the same is reproduced below:-

> *"I have considered the submission of the appellant counsel based on the commentaries by different writers and the fact that the agent having income from other four principals indicate that the agent is independent. The AO has only seen the agreement with the appellant and he has not tried to examine whether FCIPL is having income only from the appellant or from any other persons (principals). From the Profit and loss Account and Balance sheet filed before me, it is clear that the agent FCIPL is having commission from 4 different principals. Therefore, it is not an exclusive agent of the appellant and, accordingly, it does not come under the purview of the definition of the dependent agent as defined in Article 5(5) of DTAA between India and Mauritius. Accordingly, appellant is not having any PË in India and therefore, he is not taxable as per Article 7 of the DTAA between India and Mauritius. Accordingly, this ground of appeal is allowed."*

After having gone through the facts of the present case, arguments addressed by the parties, judgment cited before us, material placed on record, orders passed by revenue authorities, written submissions of the parties and after going through the DTAA executed between India and Mauritius and as per the terms /Article contained in DTAA, we find the following proposition:-

i) Article 5(4) of the DTAA provides that a person of a Contracting State acting for or on behalf of an enterprise of the other Contracting State (other than an agent of an independent status) shall be deemed to be a PE if the conditions laid down therein are satisfied viz. the agent (i) has and habitually exercises an authority to conclude contracts in the name of the enterprise or (ii) habitually maintains a stock of goods or merchandise belonging to the enterprise from which he regularly fulfils orders on behalf of the enterprise.

ii) Article 5(5) of the treaty states that an enterprise shall not be deemed to have a PE merely because it carries on business in the other State through an agent of an independent status acting in the ordinary course of its business. Art. 5(5) further states that when the activities of the agent are devoted exclusively or almost exclusively on behalf of the foreign enterprise, the agent will not be considered to be an agent of an independent status. Thus, one has to see whether "Freight Connection" can be regarded as an agent of an

independent status. If so it would not constitute the assessee' s permanent establishment.

iii) Freight Connection is an agent of independent status and acts for the assessee in the ordinary course of its business. Its activities are not devoted exclusively or almost exclusively on behalf of the assessee in view of the following:

a. Oxford Dictionary defines exclusively to mean 'so as to exclude all except some particular object, subject, etc.; solely.'

b. Oxford Dictionary defines solely to mean (i) 'as a single person (or thing); without any other as an associate, partner, sharer, etc.; alone; occas. without aid or assistance'

(ii) 'apart from or unaccompanied by others; solitarily

(iii) only, merely, exclusively; also (contextually), entirely, altogether. The dictionary meanings were handed over separately in the course of the hearing.

c. The dictionary meanings of the term 'exclusively' clearly suggest that the agent should earn 100% or something near to 100% from this principal so as to be dubbed as a dependant agent which is not the fact in the present case.

d. Mumbai ITAT in the case of ***Shardul Securities Ltd. v. JCIT (115 lTD 345)*** *at Pg 15 has extracted the definition of '**exclusively**' and has held that the term '**exclusively** or **almost exclusively**' means 100% or something nearer to 100%.*

e. In the present case, it is clear that the activities of Freight Connection are not devoted exclusively or almost exclusively on behalf of the assessee as it also does work on behalf of other principals and earns a substantial part of its income from them as clearly found by the CIT(A) in his appellate orders as mentioned above.

*f. During the course of the hearing, the learned DR placed reliance on Clause 11 of the Agency Agreement between the Assessee and Freight Connection (Page 21 of the paperbook for AY 2001-02) and submitted that Freight Connection cannot act as an agent for any other person apart from the assessee, as the same would be in contravention of the Agency Agreement. Towards the same, it is submitted that Clause 11 only restricts Freight Connection from acting as an agent for any other principal carrying on business '**in competition**' with that of the assessee. As stated above, it is an admitted fact that Freight Connection has acted as an agent for*

other principals as well. Therefore, the argument of the learned DR is without any basis.

We find that on a plain reading of Art. 5(5), it is clear that for determining the independence, one should look at the agent and as to whether the agent has only one principal for whom the agent works exclusively. The fact that the principal has only one agent in India who undertakes all the activities for the principal is not relevant. In this respect, we draw strength from the decision of the Mumbai ITAT in ***ACIT v. DHL Operations BV Netherlands (supra****)which was relied upon by Ld. CIT(A) in AY 2001 —02 in assessee's own case for departing from the decision of Ld. CIT(A) in AY 1998 – 99 is no longer good law in view of the following:-*

a) Mumbai ITAT in the case of ***DDIT(IT) v. B4U International Holdings Ltd. (137 lTD 346)*** *while departing from the ratio laid down in DHL Operations held that one has to look at the activities of the agent and its "devotion" to the non-resident principal and not the other way round i.e. the perspective should be from the angle of the agent and not that of the non-resident principal. Therefore, if an agent exclusively works for one principal he may be said to be dependant agent resulting in Agency PE but where the principal has a sole agent who also undertakes work and undertakes such work extensively for other principals the agent cannot be said to be* ***"dependant"*** *and there can be no question of creation of an Agency PE. While arriving at its decision, Mumbai ITAT in B4U also relied on the decisions of the AAR in* ***Morgan Stanley & Co. (272 ITR 416)*** *(Pg 10 of 134U decision),* ***Fidelity Advisor Series VIII (271 ITR 1)*** *(Pg 11 of B4U decision). Reliance was also placed on the decision of the* ***Delhi HC in Rolls Royce Singapore (P) Ltd. v. ADIT (347 ITR 192)*** *(Pg 12 of B4U decision) where the HC held that an agency PE would not exist if the assessee principal could show that it was not the sole client of the agent and that the activities of the agent were not devoted wholly or almost wholly on behalf of the asses see.*

b) The Hon'ble Bombay HC in ***DIT(IT) v. B4U International Holdings Ltd. (374 ITR 453)*** *while dealing with the Revenue's appeal from the aforesaid order of the ITAT on the aspect as to whether the ITAT was correct in holding that B4U cannot be treated as a dependant agent of the assessee, in view of Art. 5(5) of the India Mauritius Treaty, dismissed the revenue's appeal holding that ITAT's order did not give rise to any substantial question of law.*

c) The Hon'ble Mumbai ITAT in the case of ***International Global Networks BV v. ADIT (84 taxmann.com 188)*** *has also held the agent to be an independent agent where it acts in its ordinary course*

of business and the activities of the agent are not wholly or exclusively devoted to the assessee.

We have also considered the judgments relied by Ld. AR and the same are discussed below:-

a. The Hon'ble Supreme Court in the case of ***ADIT v. E-Funds IT Solution Inc. (Civil Appeal No. 6082 of 2015)*** *observed that the assessee must have a fixed place of business in India which is at its disposal through which it carries on its business. SC held that there was no specific finding in the assessment or the appellate orders that any fixed place of business was put at the disposal of the assessee. SC held that the assessee did not have a Fixed Place PE in India and observed that the lower authorities had adopted an erroneous approach in holding that the assessee had a PE in India for the reason that the assessee did business with its 100% subsidiary.*

b. The Hon'ble Mumbai ITAT in the case of ***Delmas, France v. ADIT(IT) (49 SOT 719)*** *held that where a foreign enterprise carries on business in a country through an agent, the provisions of Article 5(1) - Fixed Place PE do not come into play. Bombay HC in* ***DIT(IT) v. Delmas France (232 Taxman 401)*** *dismissed the revenue's appeal against the order of the ITAT.*

Considering the above legal proposition and as well as facts of the present case we find that the Hon'ble Bombay High Court has affirmed the Tribunal's decision in B4U International Holdings which had held that the conclusion in DHL Operations was erroneous. Therefore, we hold that the Freight Connection is an independent agent who acts in its ordinary course of its business and whose activities are not devoted ***exclusively*** *or* ***almost exclusively*** *on behalf of the assessee. Therefore, it is held that the assessee does not have an Agency PE in India and the CIT(A) was right in so holding for the AY 1998 - 99 and the successor CIT(A) was wrong in taking a contrary view for the subsequent assessment years. Accordingly, we further hold that even if the assessee's case is not covered by Article 8, the business profits would not be chargeable to Indian tax as it does not carry on business in India through a permanent establishment (an agency PE) as per articles 7 and 5 of the DTAA.*

No other facts or contrary judgments have been brought on record before us by the Ld. DR in order to controvert or rebut the findings recorded by the Ld.CIT (A). Moreover, there are no reasons for us to deviate from the findings recorded by the Ld. CIT (A). Therefore, we are of the considered view that the findings recoded by the Ld. CIT (A) are

judicious and are well reasoned. Accordingly, we uphold the same. Resultantly, this ground raised by the Revenue stands ***dismissed.***

In Paragraph 34 of the order, the co-ordinate bench has held that the assessee is not having fixed place PE also and in this regard, the bench has referred to the discussions extracted above.

10. The facts in the present case are identical in nature and further the very same agent M/s Freight Connection India Pvt Ltd as acted as the agent of the assessee herein also. The co-ordinate bench in the case of Bay lines (Mauritius)(supra) has held that M/s Freight Connection India P Ltd is an agent of independent status and hence it cannot be considered as constituting Agency PE of that assessee. The decision so rendered shall also apply to the assessee herein and accordingly, we hold that M/s Freight Connection India P Ltd shall not constitute Agency PE of the assessee.

11. The co-ordinate bench has placed reliance on the decision rendered by Hon'ble Supreme Court in the case of ADIT Vs. E-Funds IT Solution Inc. (Civil Appeal No.6082 of 2015) and also the decision rendered by Mumbai bench of Tribunal in the case of Delmas France Vs. ADIT (49 SOT 719) to hold that where a foreign enterprise carries on business in a country through an agent, the provisions of Article 5(1) relating to Fixed place PE does not come into play. The co-ordinate bench has also noted that the appeal filed by challenging the decision so rendered by the Tribunal in the case of Delmas France has been dismissed by Hon'ble Bombay High Court in its decision reported in 232 Taxman 40). The facts, being identical, following the decision of the co-ordinate bench rendered in the case of Bay lines (Mauritius)(supra), we hold that the assessee does not have Fixed place PE in India.

12. Since we have held that the assessee does not have PE in India and its income being business income, it cannot be brought to tax in India. Accordingly we set aside the orders passed by Ld CIT(A) on this issue in all the years under consideration.

13. The next common issue relates to computation of profit as per provisions of section 44B of the Act. The assessee did not press this ground in all the years and accordingly the grounds relating to this issue is dismissed as not pressed in all the years.

14. We shall now take up individual issues raised in various years. In AY 2009-10 (ITA No.6236/M/2014), the assessee has raised a ground relating to chargeability of interest u/s. 234B of the Act. Since, in the earlier paragraphs we have held that business income of the assessee is not liable to tax in India, the question of charging interest u/s. 234B does not arise and in any case it is consequential in nature.

15. The assessee has also raised ground relating to chargeability of interest u/s. 234A of the Act in AY 1999-2000 (ITA No.5516/M/2006) and in AY 2000-01 (ITA No.5517/M/06). Charging of interest u/s. 234A is consequential in nature and hence these grounds do not require any adjudication.

16. The assessee has also raised ground No. 5 in ITA No. 4414/Mum/2009 for A.Y. 2004-05 relating to action of the Assessing Officer in denying benefit of Article-8 to the assessee by holding that it is not engaged in the business of operation of ship. The assessee did not press this ground and hence this ground is dismissed as not pressed.

17. In all the appeals, the assessee has also raised grounds relating to attribution of profit. It was contended that no profit is required to be attributed if agent is remunerated at arm's length. This is an alternative ground raised by the assessee. Since we have held that the assessee is not liable for taxation in India for its business profits, we do not find it necessary to adjudicate this ground.

18. We shall now take up the appeals filed by the revenue challenging the order passed by Ld CIT(A) deleting the penalty levied u/s 271(1)(c) of the Act in AY 2003-04 to 2007-08. The Ld CIT(A) deleted the penalty holding that the

issue relating to taxability of income is debatable in nature. Since we have held that the assessee is not liable for taxation in India for its business profits, the penalty orders passed by the AO in all the five years would not survive. Accordingly, we quash the impugned penalty orders passed by the tax authorities in all the five years cited above.

19. In the result, all the appeals of the assessee are treated as allowed and all the appeals of the revenue are dismissed.

Order has been pronounced in the Court on 07.03.2018.

Sd/-	Sd/-
(PAWAN SINGH)	(B.R.BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 07/03/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

Senior Private Secretary
ITAT, Mumbai

PS