IN THE INCOME-TAX APPELLATE TRIBUNAL "L" BENCH MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

AND SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.1447/Mum/2016 (Assessment Year 2012-13)

DCIT (IT)-2(1)(2), Room No.1713, 17th Floor, Air India Building, Nariman Point, Mumbai-400021.	Vs.	M/s Dominos Pizza International Franchising Inc, C/o SRBC & Associates, 16th Floor, The Ruby, 29 Senapati Bapat Marg, Dadar (W), Mumbai-400028. **PAN: AAECD2315C**
Appellant		Respondent

Appellant by : Shri Samuel Darse (CIT-DR)

Respondent by : Shri M.P. Lohia (AR)

Date of Hearing : 20.02.2018

Date of Pronouncement : 18.05.2018

ORDERUNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by Revenue is directed against the assessment order under section 143(3) r.w.s.144C(13) dated 22.01.2016, passed in pursuance of direction of Dispute Resolution Panel-1, (DRP) Mumbai dated 22.12.2015 for Assessment Year 2012-13. The Revenue has raised the following grounds of appeal:

> 1. "Whether on the facts and under the circumstances of the case and in law, the Ld. DRP is right in holding that Jubilant Food Works Limited does not constitute a Permanent Establishment of the assessee in India.
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> 2. "Whether on the facts and under the circumstances of the case and in law, the Ld. DRP is right in holding that the income of the assessee should be treated as royalty income only and not income u/s 44DA of the Income-tax Act, 1961.
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> 3. The Appellant prays that the order of the ld. DRP on the above grounds be set aside and that of the Assessing Officer be restored.

2. Brief facts of the case are that the assessee is a Company is tax resident of United States of America (USA), filed its return of income for Assessment Year 2012-13 on 27.09.2012 declaring total income of Rs. 1,65,33,247/-. The assessee has offered the income in the nature of Royalty taxable @ 10% as per India-USA Double Taxation Avoidance Agreement (DTAA). The assessee has offered the income from franchise fee and consultancy services provided to M/s Jubilant Food Works Limited (Jubilant) for opening of store. The Assessing Officer passed the Draft Assessment Order under section 143(3) r.w.s. 144C dated 27.03.2015. The Assessing Officer while passing the Draft Assessment held that assessee constituted a dependent agency/permanent establishment in India as per Article-5 of DTAA between India and USA. The Assessing Officer also took the view that the amount of 5% of the total income should be allowed as deduction for the purpose of computing the income from business of assessee. Therefore, 95% of the income offered by assessee was subjected to tax @ 40% with statutory surcharge. Aggrieved by the order of said Draft Assessment Order, the assessee filed objection before the DRP, objecting on the ground that assessee has not constituted a dependent agency/permanent establishment in India as per Article 5 of India-US DTAA and also challenged the action of Assessing Officer in holding that 5% of the total income of the assessee should be allowed as deduction for the purpose of computing income from

business. The DRP accepted the contention of assessee that the Jubilant does not constitute a permanent establishment or dependent agency or an agency PE of assessee. Consequent upon the action of Assessing Officer in treating the royalty income as Profit & Gain from business under section 44DA was also set-aside. Pursuant to the direction of DRP, the Assessing Officer passed the assessment order dated 22.01.2016 under section 143(3) r.w.s. 144C(13). Therefore, aggrieved by the direction of DRP, the revenue has filed the present appeal before us.

3. We have heard the ld. Departmental Representative (DR) for the Revenue and ld. Authorized Representative (AR) of the assessee and perused the material available on record. The ld. DR for the Revenue supported the order of Draft Assessment passed by Assessing Officer. The ld. DR further submits that Jubilant is an agency PE of the assessee as per definition provided under India US DTAA means a fixed place of business through which business or enterprise is wholly or partly carried on. There is one exception to the general Rule i.e. under certain condition, a person is acting on behalf of enterprises and then enterprises can be deemed to have a PE in India though it does not have any fixed place of business. As per the provisions of Income-tax Act, the income arising by foreign enterprises through "business connection in India would be taxable in India". The business connection postulates existence of substantially element of enduring or permanent nature, of foreign enterprises in another

country, which can be attributed to fixed place of business in that country. Even section 92F defines permanent establishment, which includes fixed place of business through which the business or enterprise is wholly or partly carried on. In support of his submission, the ld. DR relied upon the decision of Formula One World Championship Ltd. vs. CIT 394 ITR 80/[2017] 80 Taxmann.com 347 (SC).

4. On the other hand, the ld. AR of the assessee supported the order of DRP. The ld. AR of the assessee further submits that the assessee entered into Master Franchises Agreement (MFA) with Domino Pizza India Limited, now known as Jubilant and for the franchise of Dominos Pizza Store. Copy of MFA was furnished to the Assessing Officer. The said MFA provide certain store/consultancy services to Jubilant. In consideration that Jubilant paid store opening fees for those services. The franchise fee is received by assessee from Jubilant for ongoing use of Dominos Trademark and also for the right to use the new technology, new product development and system improvement. As per MFA dated 23.09.2009, the assessee is entitled to charge 3% of the sales of store of Jubilant and further 3% on sale of their sub-franchise store. (copy of MFA is placed on record at page no.16 to 108 of PB) & (copy of sub-franchise agreement dated 23.02.2010 is at page no. 109 to 142 of PB). The ld. AR of the assessee further submits that M/s Jubilant does not act on behalf of assessee (clause-1.4 of the agreement provides irrevocable right to Jubilant to establish or appoint

its commissionaire in India, for the purpose of supply of food ingredients and beverage product and other supply. Clause-10 of MFA (agreement) imposes obligation to Jubilant with the statutory obligation in India, without any intervention of assessee. Further Clause-11 of agreement provides the right to determine the price charged by assessee its store and sub-franchise in India. The assessee has no say in the matter, and can only place advisory role. No guidance offered by assessee which deemed or constitutes to impose any obligation to charge any fixed minimum or maximum price. Therefore, the Jubilant has complete independence with regard to its business dealing and transaction and does not act on behalf of assessee or under its instruction. The ld. AR of the assessee further submits that for existence of dependent agent PE, the Agent must have authority to conclude contract in the name of foreign enterprises and agent recorded as authorize to conclude contract on behalf of Principle if he is permitted to negotiate all aspect of the contract in a matter that might effectively bind its principle. Further, Clause-3 and clause-5.1 of agreement deals with sub-franchise agreement. Clause -3.1 specifically states that assessee has sole to lay down the criteria adopted by Jubilant or for approval of all sub-franchises in India. The ld. AR of the assessee further submits that Jubilant is legal and economically the independent entity. In support of his submission, the ld. AR of the assessee has filed a list of various case law, however, while making submissions relied only

upon the decision of Bhopal Sugar Industries Vs Sales Tax Officer (1977 CTR 284) and Western Union Financial Services Inc (104 ITD 40) (Del).

5. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also gone through the copy of MFA dated 23.09.2009 (PB 16 to 108), copy of sub-franchise agreement between the Jubilant Food Works Pvt. Ltd. with Travel Food Services Pvt. Ltd. dated 23.02.2010 for Mumbai location (PB 109 to 142) and Jubilant Food Works Pvt. Ltd. and Travel Food Services Pvt. Ltd. for Delhi Location effective from 01.05.2010 (PB 143 to 172). We have also perused the various provisions of India-US DTAA. We have noted that the Assessing Officer while passing assessment order held that assessee constitute a dependent agency permanent establishment in India as per Article 5 of India-USA DTAA. The Assessing Officer took the view that Jubilant is totally dependent upon the assessee. Assessee has exclusive franchise right in India. Jubilant is not allowed any other activities other than activities prescribed in the agreement. Further, the quality of material and equipment used has to be approved by the assessee. The expenses on advertisement and marketing are also carried out in accordance with the provision of agreement. For expansion of the market or penetration has to be followed with the condition of MFA. Princes are also decided by assessee and not by Jubilant or sub-franchise. On the basis of above observation, the Assessing Officer concluded that Jubilant does not have

economic independence and its modus-operandi is not on principal to principal basis. Therefore, Jubilant is dependent agent for the purpose of determining a PE. The Assessing Officer treated the receipt from operations in India as a business receipt taxable @ 40% along with statutory cess.

6. Before DRP, the assessee urged the similar contention as urged before us. In addition to the submission, the assessee contended that during the proceeding before DRP, there was mistake in submission of fact that assessee has sole right to lay down the term and condition with some franchise and that all contract and sub-franchise are concluded and signed only by assessee. The correct fact that the sub-franchise agreement is executed between Jubilant and sub-franchise and not between the assessee and sub-franchise. We have verified these facts from the copy of MFA and sub-franchise agreement (SFA) (Page No. 16 to 108 and 109 to 142 and 143 to 172 of PB) and find that the assertion of assessee is correct. The SFA is signed on behalf of Jubilant and Travel Food Services Pvt. Ltd. for Mumbai and Delhi Location. As per the clause of MFA, the assessee is entitled to 3% of sale proceed and further entitled for store opening fees as well as sub-franchise fees. We have also noted that the profit and loss from the business belongs to Jubilant or sub-franchise. We have noted that certain clauses and the agreement entitles the assessee to examine the accounts, approve suppliers and allowing control over advertisement,

however, the Jubilant or sub-franchise are not storing any goods on behalf of assessee. From the sub-franchise, the assessee is entitled only royalty and store opening fees. We have also perused Article-5 of India-USA DTAA and found that none of the condition prescribed under clause-(a) to clause-(l) of Article-5.2 are attracted. The Assessing Officer has relied upon Article-5.4 of India-USA DTAA. However, we have noted that the assessee has no authority to maintain in the first mentioned state its stock or goods or merchandise from which he regularly deliver goods or merchandise on behalf of the assessee. No activities are carried out by the by Jubilant on behalf of the assessee. In our view, none of the clause either (a), (b) or (c) of Article-5.4 are applicable on the assessee. Therefore, considering the contents of the MFA and SFA, the Master franchise are independent business entity, the restriction provided in MFA and SFA are only to safeguard the brand value and to ensure the correct receipt of royalty income as concluded by ld. DRP. Hence, we do not find any infirmity or illegality in the assessment order passed in pursuance of direction of DRP. The case law relied by ld. DR in Formula One World Championship Ltd. is not helpful to the Revenue. As the fact of the said case are at variance. In the said case physical control of the circuit was with Formula One World Championship Ltd. (FOWC) and its affiliates from the inception. However, in the present case, there is no physical control on the business of franchise and sub-franchise by the assessee. In

the result, we do not find any merit in the Ground No.1 of the appeal of the Revenue.

7. As we have confirmed the finding of ld. DRP on Ground No.1 of the appeal, therefore, discussion on other Grounds of appeal raised by Revenue has become academic.

8. In the result, appeal filed by Revenue is dismissed.

Order pronounced in the open court on 18.05.2018.

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

Mumbai, Date: 18.05.2018
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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4.The concerned CIT
5. DR "L" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai