IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 7347/Mum/2019 (Assessment Year 2013-14)

DCIT,IT-1(1)(2) Room NO.528, 5th Floor Air India Building Nariman Point Mumbai-40 021 PAN : AADCA0878J	Vs.	Arc Line C/o. Freight Connection India Pvt.Ltd. 3C Runwal Omkar Esquare Sion Chunabhatti Junction Sion Trombay Road, Sion(E) Mumbai-400 022
(Appellant)		(Respondent)

Assessee by	Shri Harsh Kothari
Department by	Shri Vijay Kumar Subramaniyam
Date of Hearing	03.08.2021
Date of Pronouncement	06.10.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Revenue is directed against the order of learned CIT(A)-55 dated 17.09.2019 and pertains to Assessment Year 2013-14.

2. The grounds of appeal read as under :

1. Whether in the facts and circumstances of the case and in law, Ld CIT(A) erred in holding that Freight Connections India Pvt Ltd (FCIPL) does not constitute a dependent agent PE of the assessee in India?

2. Whether in the facts and circumstances of the case and in law, Ld CIT(A) erred in not taking into account that FCIPL acts exclusively or almost exclusively as an agent on behalf of non-resident principals which are part of the same group of enterprises and thus is not an agent of independent status within the meaning of paragraph 5 of Article 5 of India-Mauritius DTAA?

3. Whether in the facts and circumstances of the case and in law, Ld CIT(A) erred in interpreting paragraph 5 of Article 5 of the India-Mauritius DTAA sans its context of

paragraph 7 of Article 5 of UN Model Convention of 1980 and the Commentary thereof from which it derives its origins?

4. Whether in the facts and circumstances of the case and in law, Ld CIT(A) erred in not taking into account that the second sentence of paragraph 5 of Article 5 of India-Mauritius DTAA is *part materia* to the second sentence of paragraph 7 of Article 5 of UN MC 1980 and is not found in OECD MC 1977 and thus embodies the meaning expressed in the Commentary thereof, which provides that when an agent acts exclusively or almost exclusively on behalf of non-resident principals which are part of the same group of enterprises it does not constitute an agent of independent status?

5. Whether in the facts and circumstances of the case and in law, Ld CIT(A) erred in not considering that the second proviso to Explanation 2 to section 9(l)(i) of the IT Act, 1961 while providing that an agent working mainly or wholly on behalf of non-residents under common control is not an agent of independent status represents a clarification regarding India's consistent stand whenever it uses the second sentence of paragraph 7 of Article 5 of UN MC 1980 in its Treaties?

6. Whether in the facts and circumstances of the case and in law, Ld CIT(A) was correct in stating that the decision of Ld. ITAT in case of ACIT v. DHL Operations BV Netherlands (in ITA Nos. 7987 & 7988/Bom/92) is no longer good law without taking into account that the second sentence of paragraph 5 of Article 5 of India-Mauritius DTAA has its origins and derives its meaning from the UN MC 1980 and its Commentary?

7. Whether in the facts and circumstances of the case and in law, Ld CIT(A) erred in holding that Freight Connections India Pvt Ltd (FCIPL) does not constitute a Fixed place PE of the assessee in India?

3. The assessee in this case filed its e-return of income on 30/09/2013 declaring total income at Rs. Nil. In the course of assessment proceedings, the AO observed that the assessee is a non-resident company incorporated in Mauritius and is engaged in the business of shipping. It is also stated that the assessee is a tax resident of Mauritius in terms of Article 4 of the Double Taxation Avoidance Agreement ('DTAA') entered into between India and Mauritius and hence it would be entitled to the benefit of DTAA, Further, as per Article 8 of the DTAA since the place of effective management of the assessee is situated in Mauritius, the profit from the operation of ship would be liable to tax in Mauritius. In this back ground, the assessee in the return of income filed for Assessment Year 2013-14 has claimed the benefit of

DTAA as per Section 90 of the Act and declared Nil income in the return of income filed.

4. Thereafter, AO dealt with them place of effective management of the assessee by referring to Article 8(1) and 8(2) of the DTAA between India and Muritius. He referred to the residents of the Directors of the company, two of them were resident of UAE. The AO also referred to the meetings of the directors etc., and rejected assessee's plea to have been entitled for benefit of the Article 8 of the DTAA by holding as under:-

> "The assessee's contention is not acceptable for the following reasons:
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> i) Factual details as discussed above clearly suggest that the place of effective management is not in India or Mauritius but is in Dubai.
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> ii) The Directors who hold all the shares of the company between them were not physically present for the Directors Meetings and participated in the meeting by Telephone as stated by the assessee's representative,
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> iii) 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 an enterprise is not in one of the Contracting States but is situated in a third state, the benefit of the article 8 cannot be extended. The same is reproduced as below:
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> 'Article 8 furthermore applies only when the enterprisers 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 DTC 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).'
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> Accordingly, it is held that the effective management of the appellant is neither in Mauritius nor in India but in a third country. Therefore, the appellant is not entitled for the benefit of Article 8 of the DTAA.
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> iv) On page No.262 of his commentary on Double Taxation Conventions. 3rd edition. Klaus Vogel has expressed his view that in determining the place of effective management, importance is not to be attached to the statutory sear, if it may be a

domestic criterion for establishing tax residence. What is decisive is not the place where the management directives take effect, but rather the place where they are given. A place from which a business is merely supervised would not qualify. If the place of effective management cannot be determined by application of this criterion, the top managers' residence will regularly determine the residence of the company.
In the present case, all the important decisions are being taken by Mr. Saadi Rais and Mr. Salim Rais, in Dubai. and their residence is also in the game place.

v) The decision of the Hon'ble HAT in the case of UASC/CSL has not been accepted by the department and it is being contested further.

Thus, all these facts indicate that though the company was registered in Mauritius but the major policy decisions were taken in UAE. Thus, the place of effective management is the place where the key and commercial decisions that are necessary for the business are taken. In substance, the place of effective management will originally be a place where the most senior person or a group of persons sit and make its decisions, the place where the action to be taken for the entity as a whole is determined. In view of the above facts, it is held that the effective management of the assessee is neither in Mauritius nor in India. Accordingly, the assessee is not entitled for the benefit of Article 8 of the DTAA."

5. Thereafter, AO dealt with the operations of ships in International Traffic. In this connection, he referred to Article 8(5) of the DTAA between India and Mauritius regarding the term "operation of ships or aircrafts". He was of the opinion that benefit of this Article is only available to persons who either own the ships or are operating the ships through lease or charter, in the business of international transportation of goods etc. He noted that the submission of the assessee is perused. That it is seen that all the vessels which have been claimed or been used by the assessee in international transport are neither owned by the assesses, nor are they chartered or leased by the assessee. That the assessee is having a Connecting Carrier Agreement with M/s. X-Press Container Line (UK) Ltd., by virtue of which the assessee is having only slot arrangements on the ships as plied by X-Press Container Line (UK) Ltd.

He referred that Klaus Vogel in his commentary on Double Taxation Convention. 3rd edition has stated as follows on this issue.

" Leasing a ship or aircraft on charter, fully equipped, manned and supplied, is also considered a form of operating ships or aircraft. On the other hand, leasing a ship on a bareboat charter basis is not considered such a form of operation."

Further, he has stated that "For a chartering enterprise, income from the operation of a chartered ship or aircraft will in all events come under Article 8, because it is immaterial whether or not the enterprise owns the vessel or aircraft or whether it has obtained the use of it on a lease or charter basis."

Thus, what is material is the fact that the assessee should be operating the ship itself, to claim benefit under Article 8 of the DTAA. In the present case, ALM does neither own the ships in question, nor has chartered them. In fact it has obtained them on lease or even bareboat basis. They are being operated by some different party. In such a situation, benefit of Article 8 of the DTAA is not available. It is not out of place to mention here that the decision of the Hon'ble I TAT Mumbai in the case of M/s Balaji Shipping is being contested further by the department."

6. Thereafter, AO dealt with permanent Establishment in India. He noted that assessee has an exclusive agent in the form of M/s. Freight Connection India Pvt.Ltd. (FCIPL). He proposed to hold the said entity as dependent agent in terms of Article 5(5) of the DTAA without prejudice to the finding in the earlier paragraph. He opined that activities carried out by the assessee's agent in India are virtually an extension of the assessee in India. Hence, he held that the case of the assessee is covered by Article 5(1) of the DTAA, when the business of the assessee is carried out through a fixed place through its agent in India, he held that assessee is having a PE in India in the form of its Agent i.e FCIPL.

7. The AO concluded as under:-

Computation of Income:

"The assessee has a PE in India. The assessee is dnied the benefit of Article 8 of the DTAA. Thus, the business income of the PE in India will have to be determined as per the domestic laws of India. The business is covered by the provisions of Sec. 44B of the I.T.Act, 1961, which provides for presumptive taxation and deems 7.5% of the gross receipts from shipping business to be the income of the assessee.

It needs to be mentioned here that ITAT, Mumbai Bench T, has dismissed the appeal of an assessee, where the facts of the case bore a striking similarity to the present case in their order dated 26.02.2004, ITA No.5083/M/03, in the case of Integrated Container Feeder Service, for A.Y. 1998-1999. All the grounds as mentioned here. i.e. Effective place of Management Agency PE, Article 8 of the DTAA, applicability of sec.44B, etc., have been addressed therein and have been decided in the favour of the revenue. Even the Id CIT (A) has consistently upheld the earlier orders of the AO passed on the similar lines. Penalty proceedings u/s 271(1) (c) of the I T Act are initiated for concealing particulars of income and filing inaccurate particulars of income.

Accordingly, 7.5% of Rs 31,37,78,582/- (the gross receipts) amounting to Rs. 2,35,33,407/- is being held as the income of the assessee, for A.Y. 2013-14 u/s 44B of the I.T. Act, 1961."

8. Against the above order, assessee appealed before the Ld.CIT(A).

9. The Ld.CIT(A) found that all the issues were covered by the ITAT in assessee's own case for earlier years. The order of the Ld.CIT(A) in this case may be gainfully referred as under:-

" Ground No. 1 : Is with regard to place of effective management of the Appellant Company and the Appellant Company not being entitled to the benefit of Article 8 of the India Mauritius DTAA. The facts if the case are the Assessing Officer has contended that the Place of Effective Management [POEM) of the appellant company is neither in India nor in Mauritius but in Dubai and hence denied the relief under Article 8 of India Mauritius DTAA. I have gone through the Assessing Officer's order and also appellant's submissions. I find that this is a recurring issue and the same was decided by me in A.Y.2014-15 in the appellant company's case whereby following the CIT(A)'s order for the earlier year, I had taken a view that appellant's place of Effective Management is neither in India nor in Mauritius. I have

also held that as there is no change in the facts and circumstances of this issue, the appellant is not entitled to the benefits available in Article 8 of India Mauritius DTAA. I find that the Hon'ble ITAT vide its order dated 07.03.2018 has decided this issue against the appellant for A.Yrs.1998-99 to 2012-13, The Hon'ble ITAT 'L' Bench, Mumbai has relied on the decision of co-ordinate bench in the case of Bay lines (Mauritius) (supra), it will be relevant to produce the decision of the Hon'ble ITAT in the appellant's case wherein in para 3.2 of the order the ITAT produced the decision of Baylines (supra) and held that

> "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 and 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. AH 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 8 cannot be extended. The same is reproduced as below; -
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> "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)."

Hence, following my earlier order and also respectfully following Mumbai ITAT's decision, this ground of appeal is hereby dismissed.

Ground No.2: Is with regard to disallowance of claim of benefit under Articles of the India-Mauritius Double Taxation Avoidance Agreement (DTAA). The appellant has submitted that the Assessing Officer has failed to appreciate the fact that the appellant company earns income from 'Operation of ships' and hence is entitled to benefit of Article 8 of the India-Mauritius DTAA. I find that the issue involved in this ground of appeal has been dealt by my predecessor in the earlier orders of CIT(A) for A.Yrs.2008-09 to 2012-13. ! have also decided this issue in the appellant's case for A.Y.2014-15 vide order in Appeal No.CIT(A)-55/IT-28/DCIT-l(l)(2)/2017-18 dated 02,02.2018. I have held that so far us the owner of ships is concerned, it is correct that it is not a pre-requisite for earning of income from operation of ships in so far as provisions of Article 8 of the DTAA are concerned. So far as this fact is concerned, the appellant's ground is correct. However, the benefits available under Article 8 of the DTAA are anyway denied as the effective place of management is seen to be outside Mauritius, India and in UAE. The facts and circumstances are seen to have not changed in the present assessment year under consideration. Thus following the rule of consistency, this ground of appeal was dismissed.

I find that the Hon'ble ITAT, Mumbai has also decided the issue of place of effective management and hence, held that it is neither in India nor in Mauritius and hence, the appellant cannot be given the benefit available under Article 8 of the India-Mauritius DTAA. Hence, this ground of appeal is hereby dismissed.

Ground No.3(a): Is with regard to Assessing Officer holding that M/s.Freight Connection India Pvt. Ltd. hereinafter referred as FCIPL is a Dependent Agent constituting a PE within the meaning of Article 8 of DTAA. I find that this ground of appeal has been decided against the appellant in earlier assessment year by the CIT(A) and also by me in A.Y.2014-15. However, I find that Hon'ble Mumbai ITAT in appellant's own case have decided the issue in favour of the appellant vide their order dated 07.03.2018. The Hon'ble ITAT in para 10 of its order stated the following;

> 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."

Moreover even looking into appellant's facts this year it is seen FCIPL has derived merely 7.28 of its total revenue from operations from the Appellant Company, whereas 92,72% of its total revenue from operations is derived

from principals other than the Appellant Company and services independently provided to the customers.

Hence, respectfully following the Hon'ble ITAT's order as well as facts of this year, this ground of appeal is hereby allowed.

Ground No,3(b): As Ground No.3(a) has been decided in appellant's favour, this ground becomes infructuous and is hereby dismissed.

Ground No.4 ; is with regard to the Assessing Officer holding that the company carries on business in India through a fixed place through its agent in India. T:«u Assessing Officer has considered that FCIPL as PE of the appellant company under Artidi: 5(1) of the India-Mauritius DTAA, However, the appellant has argued that FCIPL only represents the appellant company in India as an agent and its acts are related to that of an agent. Moreover, it was submitted that the appellant company does not hold any premise-;; in India, does not have any right over the premises of FCIPL i.e. agent in India and does not have the said premises of FCIPL i.e. Agent at its disposal and so the basic test of fixed place of PE is not satisfied by the appellant company. So this issue was decided by the earlier CIT(A)'s order and also by me in A.Y.2014-15 against the appellant, I find that Hon'ble ITAT in appellant's case has decided this issue in favour of the appellant in earlier years. The Hon'ble ITAT observation in para 11 and 12 of the order is as follows:-

> 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. AFIT [49 SOT 719) to hold that where a foreign enterprise carrier 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.
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> Since we have held that the assessee does not have PE in India and its income being business income, ft cannot be brought to tax in India. Accordingly, we set aside the orders passed by id. CIT(A) on this issue in all the years under consideration."

As facts of the case are similar this year also, respectfully following the Hon'ble ITAT's decision, this ground of appeal is hereby **allowed.**

Ground No.5 : is with regard to determination of profit u/s.44B of the Act. f find that this issue relates to applicability of section 44B of the Act. While the appellant contends that the decision of Hon'ble Supreme Court in Union of India v. Sanyasi Rao (219 ITR 330) has been disregarded by the AO, my predecessor-CIT(A)

has held (at para no.4.2 on page nos. 4 & 5 of his order for A.Y.2008-09) that the income of the PE has to be adopted in accordance with the taxation laws of the contracting state in which the PE is situated. It follows that the income from shipping business has to be computed in accordance with the provisions of section 44AB of the Act and not in any other manner. Thus, following the rule of consistency, and after following the orders of my predecessor CIT(A) as detailed in para 5 of the order, it is held that the AO has correctly applied the provisions of section 444B. Accordingly, the appellant's this ground of appeal is also **dismissed.**

I find that this ground has not been pressed by the appellant in the earlier years before the Hon'ble ITAT, Mumbai. Hence, the ITAT has dismissed this ground.

However once the Hon'ble ITAT has held that the assessee does not have PE in India and its income being business income it cannot be brought to tax in India respectfully following Hon'ble ITAT decision this ground become academic in nature and hence being infructuous and is dismissed."

10. Against the order above, revenue is in appeal before us.

11. We have heard both the parties and perused the records. Ld. Counsel of the assessee submitted that the issues raised in appeal is squarely covered in assessee favour by the decision of ITAT in assessee's own case as under:-

i) Mumbai ITAT decision in ITA No.5122/Mum/2003 (AY 1998-99) consolidated order up to AY 2012-13
ii) Mumbai ITAT decision in ITA NO. 2332/Mum/2018 (AY 2014-15)

12. Per contra Ld. DR could not dispute proposition with issues are covered by ITAT decision in assessee's own case as above. We may gainfully refer to the operative part of the ITAT order in assessee's own case for AY 2014-15 as above on this issue.

"The next issue is whether there exists any Agency PE or fixed place PE in India. Identical issue was considered by the Tribunal in assessee's own case referred hereinbefore, by following the operative portion of the order of the Co-ordinate Bench in Bay Lines (Mauritius) (supra) which is produced below :

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 onbehalf 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 forother 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 assessee.

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 ARC Line (Mauritius) ITA No. 2332/Mum/2018 13 any fixed place of business was put at the disposal of theassessee. 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.

The facts in the present case are identical in nature and further the very same agent M/s Freight Connection India Pvt. Ltd. has 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 Pvt. 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 instant case and accordingly, we hold that M/s Freight Connection India P. Ltd. shall not constitute Agency PE of the assessee.

The Tribunal in assessee's own case for AYs 1998-99 to 2012-13 (supra) further held : "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 coordinate bench rendered in the case of Bay lines (Mauritius)(supra), we hold that the assessee does not have Fixed place PE in India.

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. Thus, we note that only challenge by the revenue in the present appeal is against the Ld.CIT(A) order that assessee does not have a PE in India inasmuch as FCIPL has been held to be not constituting a dependent agent PE of the assessee in India. Since, it is fully covered in favour of assessee by the series of ITAT order in assessee's own case as above, we uphold the order of Ld.CIT(A).

14. In the result, this appeal by the revenue stands dismissed.

Pronounced in the open court on 06.10.2021.

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 06 /10/2021
Thirumalesh, Sr.PS

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//

(Assistant Registrar)
ITAT, Mumbai