

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No.1789/Del/2022
Assessment Year: 2017-18

FCC Co. Ltd., Plot No. 5, Sector-3, IMT Manesar, Gurgaon	Vs.	ACIT, (Intl. Taxation)-1(3)(1), New Delhi
PAN :AABCF5381M		
(Appellant)		(Respondent)

Appellant by	Sh. K.M. Gupta, Advocate Ms. Shruti Khimta, AR
Respondent by	Sh. Anand Kumar Kedia, CIT(DR)

Date of hearing	18.10.2022
Date of pronouncement	26.12.2022

ORDER

PER SAKTIJIT DEY, JM:

The assessee has filed the present appeal challenging the final assessment order dated 27.06.2022 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (for short 'the Act') pertaining to assessment year 2017-18, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. The issue raised in ground nos. 2 to 7 is, whether the assessee had a Permanent Establishment (PE) in India under Article 5 of Indian- Japan Double Taxation Avoidance Agreement (DTAA) and the consequent attribution of profit to the PE.

3. Briefly the facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in Japan and a tax resident of Japan. As stated by the Assessing Officer, the assessee is engaged in the business of manufacturing of clutch systems and facings for cars, motorcycles, utility vehicles and other engines. It also undertakes moulding and machining of plastics and manufacturing of various specialized tools and dyes. Initially, the assessee had entered into a joint venture in the name and style of FCC Ricko Ltd., which ultimately merged with a wholly owned subsidiary of the assessee in India, namely, FCC Clutch India Pvt. Ltd., which is also engaged in similar business of manufacturing of supplying automobile clutch assembly. In the year under consideration, the assessee had entered into various international transactions with its AE in India. In the return of income filed for the assessment year under dispute the assessee declared income of Rs.79,65,46,784/- and offered to tax at the rate of 10% as per the treaty provisions. In course of assessment

proceeding, the Assessing Officer noticed that the incomes offered by the assessee are in the nature of royalty, Fee for Technical Services (FTS) and interest income. Whereas, amounts of Rs. 94,95,87,223/- and Rs.54,03,953/- received by the assessee towards sale of raw materials and components and capital goods, respectively, were not offered to tax on the plea that the said supplies have been made on a principal to principal basis outside India and the property/title in goods were transferred outside India. After examining the Master Sales Agreement and other materials on record, the Assessing Officer was of the view that the wholly owned subsidiary of the assessee in India is effectively assessee's PE in India and the raw materials and capital goods sold by the assessee were effectively connected with the activities of the PE. While coming to such conclusion, the Assessing Officer referred to the assessment order passed for assessment year 2015-16. Thus, following the decision taken in the preceding assessment year, the Assessing Officer ultimately held that 50% of the amount received towards sale of raw materials and capital goods is attributable to the PE in India as business income. Accordingly, he added back an amount of Rs.2,77,42,494/-.

4. Against the draft assessment order so passed, the assessee raised objections before learned DRP. Though, learned DRP was conscious of the decision of the Tribunal in assessment years 2014-15 and 2015-16 holding that the assessee had no PE in India, however, following the direction of DRP in assessment year 2017-18, learned DRP observed that the earlier view of DRP has to be followed. However, the learned DRP directed the Assessing Officer to verify assessee's claim in terms of Tribunal's orders and to complete the assessment, keeping in view the departments stand on acceptance of ITAT orders or preferring litigation against the orders of the Tribunal. Basis aforesaid direction of learned DRP, the Assessing Officer confirmed the addition made in the draft assessment order.

5. We have heard Sh. K.M. Gupta, learned counsel appearing for the assessee and Sh. Anand Kumar Kedia, learned CIT(DR). It is a common point before us that the issue is squarely covered by the decisions of the Tribunal in assessee's own case in assessment years 2014-15 and 2015-16. Copies of the relevant orders of the Tribunals were placed on record.

6. Having considered rival submissions, we find, identical issue relating to existence of PE came up for consideration before the

Tribunal in assessment years 2014-15 and 2015-16. While deciding the issue in order dated 09.03.2022 in ITA Nos. 8960 & 54/Del/2019, the Coordinate Bench accepted assessee's pleading that it has no PE in India in any form. In this regard, the following observations of the Coordinate Bench would be relevant:

"12. We have heard the Ld. Representatives of both the parties at length and perused the material on record. The primary issue before us is the determination whether FRL constitutes Fixed Place PE and / or if there is a Supervisory PE of the assessee in India in the AYs under consideration. Lets first analyse the provisions relating to the Fixed Place PE as provided under the India-Japan DTAA.

12.1 Article 5(1) of the India-Japan DTAA provides that a PE of a foreign enterprise may exist in India when a foreign enterprise has a Fixed Place in India through which the business of the foreign enterprise is wholly or partly carried out.

12.2 In order to constitute a Fixed Place PE under Article 5(1), the following conditions needs to be satisfied:

- (i) the existence of a 'place of business', i.e. a facility such as premises;*
- (ii) the place of business must be at the disposal of the enterprise;*
- (iii) this place of business must be 'fixed', i.e. it must be established at a distinct place with a certain degree of permanence; and*
- (iv) the 'carrying on of the business' of the enterprise through this fixed place of business.*

12.3 In the present case, FRL is alleged to be the place of business from which the business of the assessee is being carried out. It is well settled position that in order to constitute a Fixed Place PE it is a prerequisite that the alleged premise must be at the disposal of the enterprise. The Hon'ble Supreme Court in the case of Formula One world Championship Vs. CIT [Civil Appeal No. 3849 of 2017] has held that merely giving access to the premise to the enterprise for the purposes of the project would not suffice. The place would be treated as at the disposal of the enterprise when the enterprise has right to use the said place and has control thereupon.

12.4 In light of the facts of the case and various judicial precedents wherein the constitution of Fixed Place PE has been considered and adjudicated upon, in our opinion the conditions laid down for creation of a Fixed Place PE is not satisfied in the assessee's case. Merely providing access to the premises by FRL for the purpose of providing agreed services by the assessee would not amount to the place being at the disposal of the assessee. No doubt the assessee has access to the

factory premises of FRL but it is for the limited purposes of rendering agreed services to FRL without any control over the said premises. Moreover, FRL is an independent legal entity carrying on its business with its own clients for which the assessee provides time to time technical assistance as required by it. The business of the assessee is not being carried out from the alleged Fixed Place PE. The Ld. DR in support of his contention that FRL constitutes Fixed Place PE of the assessee has placed reliance on certain clauses of the Licence Agreement and argued that title of goods supplied by the assessee to FRL passed in India and hence the assessee is carrying on business in India. In our opinion, reference to these clauses is irrelevant to conclude that the title of goods passed in India and thus Fixed Place PE of the assessee is created in India in view of the judgment of the Hon'ble Supreme Court in Mahabir Commercial Co. Ltd (supra). Since the goods were manufactured outside India, sale of goods took place outside India and consideration was also received by the assessee outside India, title passed outside India and hence the assessee has not carried out any operation in India in relation to supply of the raw material and capital goods. We therefore hold that the assessee does not have a Fixed Place PE in India.

13. Now coming to the Supervisory PE, Article 5(4) of the India-Japan DTAA provides as under-

“An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it carries on supervisory activities in that Contracting State for more than six months in connection with a building site or construction, installation or assembly project which is being undertaken in that Contracting State.”

13.1 In the previous hearing held on 1.11.2021 this Bench had directed the assessee to file the description of services rendered by the employees of the assessee on their visit to India and the corresponding clause under the Agreement for Dispatch of Engineers under which such services would fall. In response, the assessee furnished Annexure 1 for AY 2014-15 and Annexure 2 for AY 2015-16 vide its written submission filed on 17.11.2021 providing the names of the employees who visited India along with the work performed by them giving reference of the relevant clause of the Agreement for Dispatch of Engineers along with Request for Technical Services (RFT) of the respective employee. The said Annexure 1 and Annexure 2 are on record.

13.2 Perusal of the above documents show that the employees of the assessee visited India to assist FRL in relation to supplies made by FRL/FCC Clutch to its customers; resolving problems relating to production, fixing of machines, maintenance of machines; checking safety status at the premises and suggesting ways for enhancing safety; support in quality control; IT related services; support for launch of new segment line; etc. In our considered opinion, none of these activities performed by the employees are in the nature of supervisory functions, supervision being the act of overseeing or watching over someone or something which is not reflected in the work done by the engineers in India for FRL.

13.3 Moreover, no installation or assembly project was on going at FRL's premises. FRL is in the existing business since many years and no new line of

business has been launched by FRL. The employees were not rendering any services in connection with building site or a construction project or an installation project or an assembly project. From the nature of the services rendered by the employees, it is amply clear that these activities were not in connection with a building site or construction installation or assembly project. Hence the issue of computation of period of six months also becomes academic. The employees are visiting India on year to year basis under the contract. In AY 2014-15 and AY 2015-16, the employees visited India to render certain technical services under the Licence Agreement read with Dispatch of Engineers Agreement which have been duly offered to tax by the assessee as FTS as per the provisions of India-Japan DTAA. We therefore hold that there is no Supervisory PE of the assessee for the AYs under consideration.

13.4 Since we have held that the assessee does not have a PE, the issue of attribution of profits to such PE does not arise for consideration.”

7. There cannot be any dispute that factually the impugned assessment year stands in identical footing to assessment years 2014-15 and 2015-16. This is further evident from the fact that, both, the Assessing Officer and learned DRP have acknowledged that the factual position in the present assessment year is identical to the preceding assessment years. Thus, respectfully following the decision of the Coordinate Bench, as discussed above, we hold that the assessee had no PE in India in any form whatsoever. Therefore, the addition made by attributing a part of the income of the assessee to the alleged PE has to be deleted. Accordingly, we do so. Grounds are allowed.

8. In ground no. 8, the assessee has raised a legal issue as to whether surcharge and cess can be levied over and above tax computed at the rate of 10% as per treaty provisions.

9. Having considered rival submissions, in principle, we accept assessee's contention that levy of surcharge and cess cannot exceed the tax rate of 10% as per India – Japan DTAA. Article 12 of India – Japan tax treaty provides that the tax to be charged on royalty and FTS shall not exceed 10% of the gross amount of royalty or FTS. Article 2 of the tax treaty defines tax in India as income tax including any surcharge thereon. Therefore, Article 12 read with Article 2 of the tax treaty makes it clear that the rate of tax at 10% would encompass surcharge and education cess as it is also in the nature of surcharge. Therefore, we hold that levy of surcharge and cess over and above the taxable rate of 10% on royalty and FTS is not permissible as per the treaty provisions. While coming to such conclusion, we are well supported by the following decisions:

- *DCIT vs Marubeni Corporation* (ITA No.: 11/Mum/2022)
- *Dy. CIT (International Taxation) v. BOC Group Ltd.* [2015] 64 [taxmann.com](#) 386/[2016] 156 ITD 402 (Kol. - Trib.)
- *JCDecaux S.A., v. ACIT/DCIT, Circle-2(1)(2), International Taxation, New Delhi* [2021] 123 [taxmann.com](#) 221 (Delhi - Trib.)

- *DIC Asia Pacific Pte Ltd vs Asst Director of Income Tax, International Taxation (2012)* 52 SOT 447 (Kol ITAT)
- *Sunil V. Motiani vs ITO (International Taxation) (2013)* 33 taxmann.com 252 (Mumbai Trib)
- *Parke Davis and Company LLC vs ACIT (2014)* 41 taxmann.com 193 (Mumbai Trib)
- *ITO (Intl Taxn) vs M/s M Far Hotels Ltd in ITA Nos. 430 to 435 / Coch / 2011 dated 5.4.2013 (Cochin Tribunal)*

10. In view of above, this ground is allowed.

11. Ground nos. 9 and 10, being consequential in nature, do not required adjudication.

12. In the result, the appeal is allowed, as indicated above.

Order pronounced in the open court on 26th December, 2022

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 26th December, 2022.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi