

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER  
AND DR. BRR KUMAR, ACCOUNTANT MEMBER**

**ITA No. 766/Del/2023**

Assessment Year: 2020-21

FCC Co. Ltd., Japan, C/o. Plot No.5 Sector-3, IMT Manesar, Gurgaon, Haryana PIN: 122050	<b>Vs.</b>	ACIT, Circle-1(3)(1), International Circle, New Delhi
<b>PAN :AABCF5381M</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Stay Application No.172/Del/2023

( In ITA No. 766/Del/2023 )

Assessment Year: 2020-21

FCC Co. Ltd., Japan, C/o. Plot No.5 Sector-3, IMT Manesar, Gurgaon, Haryana PIN: 122050	<b>Vs.</b>	ACIT, Circle-1(3)(1), International Circle, New Delhi
<b>PAN :AABCF5381M</b>		
<b>(Applicant)</b>		<b>(Respondent)</b>

Assessee by	Ms. Shruti Khimta, AR & Shri K.M. Gupta, Advocate
Department by	Shri Vijay Vazanta, CIT-DR

Date of hearing	19.04.2023
Date of pronouncement	19.04.2023

### **ORDER**

#### **PER SAKTIJIT DEY, JUDICIAL MEMBER:**

Captioned appeal has been filed by the assessee assailing the final assessment order dated 21.01.2023 passed under Section 143(3) read with section 144C(13) of the Income-Tax Act,1961 pertaining to assessment year 2020-21, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. In the present appeal, we have been called upon to decide whether the assessee had a Permanent Establishment (PE) either in the nature of a fixed place PE or Supervisory PE under Article 5 of Indian-Japan Double Taxation Avoidance Agreement (DTAA).

3. Before us, learned counsel appearing for the assessee, submitted that the issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case in assessment years 2014-15, 2015-16 and 2017-18. In this context, she drew our attention to the relevant observations of the Tribunal.

4. Learned Departmental Representative, though, fairly agreed that the issue is covered by the decision of the Tribunal, however, he

dutifully relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

5. Having considered rival submissions, we find, the assessee is a non-resident corporate entity incorporated in Japan and is a tax resident of Japan. It is engaged in the business of manufacturing of clutch system and facing for cars, motor-cycles, utility and other engines. Assessee undertakes moulding and machining of plastics and manufacturing of various specialized tools and dyes. In the year under consideration, the assessee had sold raw-material, components and capital goods to its Indian group entity and earned revenue of Rs.124,70,13,324 and Rs.7,68,98,560 respectively. Besides the aforesaid amounts, the assessee had received income in the nature of royalty and Fee for Technical Services (FTS), which were offered to tax in India under the treaty provisions. Whereas, the income earned from sale of raw-material and capital goods were not offered to tax in India on the plea that such supplies have been made on a Principal to Principal basis outside India and the title in goods was transferred outside India. The Assessing Officer, however, was not convinced with the submissions of the assessee. Following the decisions taken by

the department in preceding assessment years i.e. 2014-15, 2015-16 and 2017-18, the Assessing Officer held that the assessee had a fixed place and supervisory PE in India in the form of Indian subsidiary and the raw-material and capital goods sold were effectively connected with the activities of the PE. Accordingly, he concluded that 50% out of the profit earned from the revenue from sale of raw-material and capital goods is attributable to the PE and hence taxable in India. Accordingly, he brought to tax an amount of Rs.3,05,82,364 in India by treating it as business income applying tax rate of 40%.

6. Against the draft assessment order so passed, the assessee raised objections before learned DRP. Though, learned DRP was conscious of the fact that in assessment years 2014-15 and 2015-16, the Tribunal has decided the issue in favour of the assessee by holding that the revenue earned from supply of raw-material and capital goods are not related to any PE in India, however, learned DRP directed to verify assessee's claim keeping in view the acceptance or otherwise of Tribunal's order.

7. From the narrations of aforesaid facts, it is very much clear that the factual position qua the disputed issue is identical to the earlier

assessment years. As already discussed in foregoing paragraphs, this is a legacy issue continuing from assessment year 2014-15 onwards. In the latest order passed for assessment year 2017-18 in ITA No.1789/Del/2022 dated 26.12.2022, the Tribunal following its earlier decision has held as under:

“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 analyze 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 License 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 License 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. Thus, respectfully following the consistent view of the Tribunal in assessee's own case, as discussed above, we hold that the assessee had no PE in India, either fixed place or supervisory, to which the profit from revenue earned from sale of raw-material and finished capital goods can be attributed. Accordingly, we delete the addition made by the Assessing Officer. Grounds are allowed.

9. Ground nos. 9 &10 on the issue of levy of interest under Section 234A, 234B and 234C being consequential in nature, do not require adjudication.

10. Ground no.11 being pre-mature at this stage, is dismissed.

11. In view of our decision in the appeal, the stay application filed by the assessee, being S.A.No.172/Del/2023, having become infructuous is dismissed.

12. In the result, the appeal is allowed as indicated above and stay application is dismissed.

***Order pronounced in the open court on 19<sup>th</sup> April, 2023.***

***Sd/-***

**(DR. BRR KUMAR)  
ACCOUNTANT MEMBER**

***Sd/-***

**(SAKTIJIT DEY )  
JUDICIAL MEMBER**

Dated: 19<sup>th</sup>April, 2023.  
Mohan Lal

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi