

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCHES 'D' : NEW DELHI)**

**BEFORE SHRI G.S.PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.1160/Del/2015, A.Y. : 2010-11

ITA No.2041/Del/2017, A.Y. : 2013-14

ITA No.7804 /Del/2017, A.Y.: 2014-15

ITA No.7276/Del/2018, A.Y.: 2015-16

Honda Trading Asia Company Limited, 152,3 rd Floor, Indosuez House, Wire Less Road, Lumpini, Pathum Wan, Bangkok, Thailand PAN: AACCH3273K	Vs.	DCIT, Sector-24, Noida
(APPELLANT)		(RESPONDENT)

Assessee by	Sh. Percy Pardiwalla, Sr. Adv. & Kamal Arya, Adv.
Revenue by	Shri Vizay B. Vasanta, CIT-DR & Sanjay Kumar, Sr. DR & Shri Om Prakash, Sr. DR
Date of hearing:	05.07.2024
Date of Pronouncement:	23.07.2024

ORDER

PER ANUBHAV SHARMA, JM:

The appeals have been filed by assessee against the assessment order for assessment years 2010-11, 2013-14, 2014-15 & 2015-16 passed by Circle Int. Tax, u/s 143(3) r.w.s. 144C(5) of the Income Tax Act, 1961 in pursuant to the directions of Dispute Resolution Panel-2, New Delhi.

2. On hearing both the sides, the Sr. Counsel has submitted that the appeals are connected and have common issues. However, ITA No.1160/Del/2015 for AY 2010-11 was considered as the lead year and, based upon the facts and observations of the tax authorities in A.Y. 2010-11, the arguments from both the sides were advanced. As for convenience on behalf of the assessee, a composite chart with summary of grounds raised by the appellant in the respective appeal has been provided and we consider it relevant to reproduce the same:-

Ground taken by the appellant in relation to	Ground No. taken by the appellant in			
	AY 2010-11	AY 2013-14	AY 2014-15	AY 2015-16
General in nature	1 and 1.1	1 and 1.1	1 and 1.1	1 and 1.1
Issue of PE in India	2, 2.1	2, 2.1, 3, 4, 5, 5.1, 7	2, 2.1, 3, 4, 5, 5.1, 6, 8	2, 2.1, 3, 4, 5, 6, 6.1, 6.2, 7, 9
Erroneous taxation of offshore supplies	3	6	7	8
FTS is not liable to tax in absence of FTS article under India- Thailand DTAA	4	7	8	9
Transfer pricing adjustment	5, 5.1, 5.2, 5.3, 6, 6.1, 6.2, 7, 8, 10, 13	N.A.	N.A.	N.A.
Double taxation of FTS receipts	9	N.A.	N.A.	N.A.
Attribution of income to activities of appellant in India	-	8 and 8.1	9, 10, 10.1	10, 11, 10.1
Application of incorrect profit ratio	N.A.	9	N.A.	N.A.
Erroneous levy of interest under section 234A, 234B and 234C	11	10 (in relation to 234B interest)	11 and 11.1	N.A.
Erroneous levy of interest under section 234D	N.A.	N.A.	11.1	N.A.
Penalty initiated under section 271BA, 271AA, 271G	12	N.A.	N.A.	N.A.
Penalty initiated under section 271 (1)(c)	-	11	12	12

2.1 Thus, the appeals are decided together by taking the relevant facts and observations from the impugned orders for AY 2010-11 and the findings shall apply pari materia to the grounds in other years wherever applicable.

3. The facts of the case are that Honda Trading Asia Co. Ltd. (herein referred to as 'HTAS' or 'the Appellant' or 'assessee') was established in Bangkok on March 18, 1991. The Appellant is a Honda Group Company and is engaged in supplying parts for motorcycle, automobile, power equipment, automotive equipment and machinery, non-ferrous metals, steel, plastics and warehouse operations.

3.1 The Appellant filed its income tax return on 13 October 2010 declaring total income of INR 4,74,73,450 for the AY under consideration. The said return was selected for scrutiny assessment proceedings by way of issue of a notice under section 143(2) of the Act.

4. The draft assessment order under section 144C(1) of the Act was passed by AO by making following adjustment;

Particulars	Adjustments as per draft order passed by Ld. AO (Amount in INR)
Offshore supplies and receipts of technical services ('FTS') as undertaken between Indian entities and HTAS	40,81,59,614
Attribution Ratio	100%

Global Profit Ratio	25%
A. Corporate Tax Adjustment	10,20,39,903 [i.e., 40,81,59,614*100%*25%]
B. Transfer Pricing Adjustment	
(a) On account of FTS receipts of HTAS	73,56,736
(b) On account of Offshore supplies made by HTAS	4,64,02,851
Total Adjustments / Additions	15,57,99,490

5. Aggrieved, the Appellant had filed objections to the draft assessment order before Dispute Resolution Panel, New Delhi ('DRP') under section 144C of the Act.

6. The DRP disposed-off the objections filed by the Appellant by partly confirming the adjustments made by the AO in its draft assessment order. Consequently, following the DRP instructions, the assessment of the Appellant was completed under section 143(3) read with section 144C of the Act at a total income of Rs. 98,36,306 with following adjustments;

Particulars	Adjustments as per draft order passed by Ld. AO. (Amount in INR)	Adjustments as per final order passed by Ld. AO (Amount in INR)
Offshore supplies and FTS receipts	40,81,59,614	40,81,59,614

as undertaken between Indian entities and HTAS		
Attribution Ratio	100%	25%
Global Profit Rate	25%	2.43%
Corporate Tax Adjustment	10,20,39,903 [i.e. 4081,59,614*100%*25%]	24,79,570 [i.e. 40,81,59,614*25%*2.43%]
B. Transfer Pricing Adjustment		
(a) On account of FTS receipts of HTAS	73,56,736	73,56,736
(b) On account of Offshore supplies made by HTAS	464,02,851	NIL
Total Adjustments/ Additions	15,57,99,490	98,36,306

7. The assessee is in appeal raising following grounds:-

“1. That on the facts & in the circumstances of the case and in law, the orders passed by the Assessing Officer (AO)/Transfer Pricing Officer (TPO)/Dispute Resolution Panel (DRP) to the extent prejudicial to the interest of the appellant, are bad in law and void ab-initio.

1.1 That on the facts and circumstances of the case and in law, the AO/TPO/DRP has erred in passing the subject orders based on surmises, conjectures and irrelevant assumptions.

Without prejudice

2. That the AO/DRP grossly erred in law and facts in alleging that the Appellant has a business connection and Permanent Establishment (PE) in India, basis the alleged facts and relationship of Honda Cars India Limited (HCIL) and Honda Motor Co., Ltd. Japan (HMJ).

2.1. That the AO/DRP grossly erred in law and facts in alleging that the Appellant has PE in India, where there are no expatriates has been deputed by the Appellant to HCIL in India.

3. That the AO/DRP grossly erred in law and facts in taxing offshore supplies (by merely relying on TPO order) when Appellant does not have any business connection or PE in India and the supplies made by the Appellant to HCIL are concluded outside India (i.e. title and risk is transferred outside India).

4. That the AO/DRP grossly erred in law and facts in taxing the fee for technical services (FTS) receipts of the Appellant in India, in the absence of FTS Article under India-Thailand Tax Treaty when Appellant does not have any business connection or PE in India.

5. That the AO/TPO/DRP erred in making an adjustment of Rs. 5,37,59,587 under section 92CA of the Act in respect of the international transactions entered into by the Appellant during the period under consideration.

5.1 That the TPO fails to comprehend that the Trading activity are not covered under the transfer pricing regulations. Section 92 is computational provision enacted in order to compute the income arising from international transaction. Section 92 is not an independent charging provision. A transaction to which charging section did not apply must be regarded as never intended by section 92 to be the subject of the charge

5.2 That the DRP/TPO fails to consider the impact of overall incidence of tax; Section 92(3) and Circular 14 of 2001 provides that the transfer pricing provision is not intended to be applied where adoption of ALP would result in a decrease in the overall tax incidence in India.

5.3 That the TPO erred in making an adjustment of Rs. 464,02,851 in respect of the international transaction relating to Trading Activity and also grossly erred in considering ad-hoc margin @10% profit on trading activity without conducting a scientific search process for identifying the

comparable companies

6. *That the AO/TPO/DRP erred in making/sustaining an adjustment of Rs.73,56,736 in respect of the international transaction relating to Technical Supervision Fees.*

6.1 *That the TPO/DRP has grossly erred in arriving/sustaining the ad-hoc set of comparable companies without adhering to the requirement of law i.e. scientific basis and standardized procedure for selecting the comparable companies.*

6.2 *That the TPO/DRP erred in taking/sustaining Indian companies with different functional profile as comparable to benchmark the international transactions entered by the Appellant.*

7. *That the AO/TPO/DRP grossly erred in law in making the adjustment in respect of the international transactions of the assessee when such transactions had already been benchmarked and found at arm's length basis in the transfer pricing assessments of the Indian AE's.*

8. *That the AO/TPO/DRP grossly erred in law in not appreciating that the Function, Asset and Risk analysis had already been examined in respect of these transactions in the assessments of the Indian AE's and hence there arose no question of allocating any further income to the Indian tax jurisdiction in respect of these transactions.*

9. *That the AO/DRP grossly erred in law in making double addition in respect of FTS receipts of the Appellant.*

10. *That the AO/TPO/DRP also grossly erred in law in not appreciating that the provisions of Article 9 of the Double Taxation Avoidance Agreement (DTAA) between Indian and Thailand prohibits any further allocation of profits to the Indian taxing jurisdiction when the international transactions had already met the test of arm's length price.*

11. *That the AO/DRP has grossly erred in law and facts in directing the levy of interest under sections 234A, 234B and 234C of the Act without appreciating that the Appellant is a non-resident and tax is deductible from the income of the Appellant.*

12. *That the AO/TPO/DRP has grossly erred in law and facts in initiating the penalty under section 271BA, 271AA and 271G of the Act and alleging that the Appellant has not complied with the provision of aforesaid*

sections. It is imperative to mention that the Appellant had duly submitted all the information, to the extent available and had filed all the necessary information on record. Further, the Appellant is under genuine believe that the export transaction is not taxable in India and in any case has made full and complete disclosure in the return of income.

13. That the TPO/DRP erred in using single year data as against the multiple year data, in order to compute the Arm's length Price of the international transactions

That the above grounds are without prejudice to each other.

The Appellant also reserves its right to add, alter or amend any ground of appeal either before or at the time of hearing of this appeal.”

8. Heard and perused the records. Ground 1 & 1.1 are general in nature.

In regard to other grounds the findings are as follows;

9. **Ground no 2;** At the outset, Ld. AR has pointed out that this Tribunal while passing order for AY 2009-10 in the case Honda Cars India Limited ('HCIL') (formerly known as Honda Siel Cars India Limited) - i.e., Indian entity which has been alleged to be a PE of the present appellant in India, has confirmed the order of CIT(A) of that assessee and held that the present assessee appellant does not have a PE in India. A copy of order for AY 2009-10 passed in case of HCIL is relied as Annexure 1 to Paper-book 4.

10. In this regard it was submitted that in the above case, the Revenue had filed an appeal before the Tribunal against the order of the CIT(A) and the relevant ground taken by the Revenue was as follows:

“5 (c)(i) On the facts and circumstances of the case and in law the Ld. CIT(A) has erred in reducing the addition from Rs. 16,23,90,27,016/- to Rs. 11,53,51,80,104/- made by AO u/s 40(a)(i) of the IT Act, thereby allowing ground No.6&7 of assessee's appeal by holding that there is no Permanent Establishment (PE) of 18 parties ignoring the fact that sale of goods by these 18 parties has been made in India to the assessee and therefore income arising as a result of the sale of taxable in India.”

11. Ld. AR pointed out that the present assessee appellant is included in the list of 18 entities. It was pointed that Tribunal has adjudicated the ground as follows:

“13.1. There is no dispute of the fact that out of 18 non-resident associate companies to whom payments have been made, it was held that 16 associated enterprises do not have a P.E. in India. The D. R. P. in the case of Asia Honda Thailand for the A. Y. 2009- 10 has held that the Non-resident company had no P.E. in India. Revenue has not filed an appeal on this finding of the D.R.P. Hence, we have to reverse the finding of the Ld. CIT(A) that Asia Honda Thailand has a P.E. in India in this A.Y. Thus, we have to hold that, except in the case of Honda Motors Japan, payments made to all other 17 nonresident associate companies do not attract the provisions of S.195 and consequently 40(a)(i) of the Act, as no portion of the income of these companies arising from the supply of parts etc. was liable for tax in India.”

12. Accordingly, it was submitted that the same view has been upheld by Tribunal in case of HCIL while passing the order for AY 2010-11 [copy of for AY 2010-11 is relied enclosed as Annexure 2 to Paper-book 4.]

13. Then Ld. AR has submitted that the AO/ DRP's reliance on survey statements is erroneous and bad in law. It is submitted that that despite two surveys carried out by the tax office, there is no corroborative evidence

available with the AO to demonstrate that expatriates are carrying out business of the Appellant. It was submitted that any order based on survey statements only, is bad, in law as per the Hon'ble Supreme Court judgment in case of **CIT v. Khader Khan Son (254 CTR 228)(SC) and CBDT Circular No. 286/2/2003-IT (Inv) dated 10 March 2003**. It was also submitted by Ld. Sr. Counsel that even the survey statements on which AO has heavily relied does not have any whisper that these employees of HCIL were carrying out the business of the Appellant. It was further submitted by Ld. Sr. Counsel that the evidence of Appellant that expatriates are carrying out the work of Honda Cars India Limited ('HCIL') only, given to controvert the allegation has not been duly considered. Ld. Sr. Counsel relied decisions in **CIT vs. Sunrise Trolling Systems (P) Limited (ITA 399 of 2013) (Delhi HC)** and **CIT vs. Shardaben K. Modi (217 Taxman 289) (Gujarat HC)** to press that survey statements have no evidentiary value.

14. It is submitted by Ld. Sr. Counsel that as per India-Thailand Double Taxation Avoidance Agreement ('DTAA'), a foreign entity can constitute a PE in India, only if it has a fixed place of business in India, through which the business activities of such foreign company are carried out in India. It is submitted that the Appellant does not have any fixed place of business in India. Reliance in this regard is placed on the decision of Hon'ble AAR in the case of the Appellant's parent company i.e., HMJ, wherein it has been held by

the AAR that the presence of expatriates of HMJ does not constitute a PE in India in the form of HCIL as they are carrying the business of HCIL only. The following relevant extract of the AAR order (F.No. AAR/1100/2011/973) is relied by Ld. AR:

".. .33. For the reasons above, we are of the considered opinion that no business of the applicant was conducted through the expatriate employees working with the subsidiary HSCI in India. As the condition of carrying on of the business of the enterprise is not fulfilled, it cannot be held that the applicant had a PE under Article 5(1) of DTAA. even if it had a fixed place of business in the form of expatriate employees. "

15. It was submitted that during the course of assessment proceedings, detail of supervisors who visited India during AY 2010-11 were filed before the Ld. AO, which are also relied here as Annexure 2 of Paper-book 2. It is submitted that the total supervisory visits to India (i.e., visits to HCIL) during AY 2010-11 is less than the threshold prescribed under Article 5(3)(a) of India-Thailand DTAA. Further, the above supervisors were not the employees of the Appellant and there were no employee visits to India during the subject year.

15.1 Ld. DR has, however, relied the orders of the ld. tax authorities below.

16. After considering the submissions and the material before us, it is established that in the case of HCIL for AY 2009-10, the issue under consideration was if HCIL, which is a subsidiary of M/s Honda Motors Company Ltd., was required to deduct tax at source for payments made for

purchase of raw material, components, etc. from non-resident companies and those non-resident companies being associated enterprises numbering 17 were found to be not having a PE in India. In fact, the Tribunal in its order dated 29.06.2016 observes that the fact that these associated enterprises which included assessee also do not have PE in India stands accepted by DRP and the Department has not gone in appeal and, thus, the issue stands finalized. In this order dated 29th June, 2016, it was held that except for Honda Motors, Japan, payments made to all other 17 non-resident associated enterprises does not attract the provisions of section 195 and, consequently, section 40(a)(i) of the Act has no operation on the income of these companies arising from the supply of part, etc., and same was not liable for tax in India. This question was determined in favour of the assessee on the basis that the assessee was not having a PE in India. Thus, the issue findings being conclusive, do not require any further indulgence of this Bench and, accordingly, we are inclined to allow this ground No.2 in favour of the assessee.

17. **Ground 3:** In relation to alleged erroneous taxation of offshore supplies Ld. Sr. Counsel relied Section 5 of the Act and submitted that this provision provides that total income of a non-resident (which is taxable under the Act) includes income which is received in India or accrues or arises in India. So, if income accrues or arises outside India and is also received

outside India, then, the same shall be outside the scope of total income and may not be liable to tax in India. It was submitted that in the present case, the Appellant is making sales to HCIL outside India and HCIL is making sale subsequently in India in its own account without any control from its suppliers. Thus, supplies made by the Appellant are not taxable in India. In this context it was also submitted that it is now well settled law that receipts arising from offshore parts supplied are not taxable in India. In this regard, reliance is placed on the judgement in **Ishikawajma Harima Heavy Industries Ltd. v. Director of Income-tax, Mumbai** (288 ITR 408) wherein the Hon'ble Supreme Court has held that only such part of the income as is attributable to operations carried out in India is taxable in India. It was submitted that Hon'ble Apex Court further held that where all parts of transaction i.e., the transfer of property in goods as well as payments thereof, are carried on outside the Indian soil, such transactions cannot be taxed in India. Ld. Sr. Counsel submitted that in the case of assessee appellant meets the tests laid down by the Hon'ble Apex Court and hence, the receipts attributable to supply of parts from outside India are not chargeable to tax in India in the hands of the Appellant.

17.1 In regard to this ground, as we appreciate the orders of the ld. tax authorities below, it comes up that the offshore-supplies are not taxable in India as the title and risk got transferred outside India. Further, the offer was

accepted outside India and contracts got concluded outside India.

18. The Ld. Sr. Counsel submitted that without prejudice to the above contention of the assessee that HTAS is not having a PE in India, since the TPO has made, adjustment on the offshore supplies citing it to be arm's length, further addition by the Ld AO on similar offshore supplies lead to double taxation which is against the principle of taxation laws. Ld. Sr. Counsel further submitted that, even otherwise, offshore supplies are not taxable in India, for the purpose of attribution, reliance was placed on the judgment of Hon'ble Madras High Court in case of **Annamalais Timber Trust (41 ITR 781)**, wherein it was held that profits exceeding 10% cannot be attributed in case of conclusion of trading operations.

19. We find that the DRP after considering various contentions raised by the assessee, observed that since it has been held by DRP that the assessee has PE in India, profits need to be attributed to various operations carried out in such PE in India. Further, since the assessee is not maintaining India specific accounts, the AO is right in applying Rule 10. However, the panel directed that instead of adhoc profit rate of 25%, global profit rate of the assessee should be applied and 25% of such profits should be attributed to PE in India. Thus, where we have concluded that the assessee has no PE in India, the directions to attribute profits to various operations carried out in PE in India are not left with any substratum and, accordingly, the ground No.3 deserves

to be allowed in favour of the assessee.

20. **Ground 4:** In regard to the claim of assessee that FTS receipts are not liable to tax in the absence of FTS article in India-Thailand DTAA. It is submitted that the India- Thailand DTAA does not contain any provisions about the taxability of fees paid for technical services and that it is a well settled law that in absence of any specific clause of the DTAA, the payments made can be taxed only under the head of Business Profits. Reliance in this regard is placed on the following decisions:

- Tekniskil (Sendirian) Berhard v. CIT [1996] 222 ITR 551 (AAR)
- Bangkok Glass Industry Co. Ltd. v. ACIT [2013] (34 taxmann.com 77) (Madras HC)
- DCIT v. Michelin ROH Co. Ltd. [2022] 138 taxmann.com 497 (Delhi - Trib.)
- ACIT v Paradigm Geophysical Pty Ltd [2008] (25 SOT 94) (Delhi ITAT)

21. The Ld. Sr. Counsel for assessee submitted that the assessee vide its Income Tax Return for the subject assessment year, offered to tax the receipts in the nature of fee for technical services (FTS) amounting to Rs.4,74,73,450 subject to tax @ 10%. Accordingly, the tax amounting Rs. 50,36,458 was paid by the Assessee on such receipts. In the given case, since there is no FTS clause in the India-Thailand DTAA, therefore, as HTAS does not have a PE in India, the subject FTS receipts should not be taxable in India.

22. DRP has considered the contentions raised by the assessee and found no force in contention of the assessee that FTS is not taxable when there is no FTS clause in DTAA. DRP observed, *“It is a matter of common understanding that fee for technical services is sub set of broader set of business income. When contracting states do not want to give separate treatment to FTS, these receipts become taxable as business receipts only.”*

23. We find substance in the observations of the DRP, but is relevant is that Section 9 of the Act enumerates certain incomes to be deemed to accrue or arise in India and Section 9(1)(vii) of the Act provides under what conditions FTS income shall be considered to accrue or arise in India. Explanation 2 to Section 9(1)(vii) of the Act gives definition of FTS and which provides that any service falls within the definition of FTS are either be in the nature of managerial services, technical services or consultancy services. Thus FTS is a species of business income with specific definition and components and in DTAA, are made taxable specifically. If not, then they are brought to tax, as business income and in that case, again the existence of PE in India is necessary, but which is not established in case of assessee. Accordingly, this ground is decided against the Revenue.

24. **Ground 11:** Interest under section 234A, 234B and 234C of the Act. It is submitted that the return of income for subject AY was filed within due date prescribed under section 139(1) of the Act, accordingly, interest under section

234A is not applicable. As with regard to interest under section 234B of the Act it was submitted that same is not leviable in the instant case and reliance in this regard was placed on the decision of Hon'ble supreme Court in case of **Director of Income-tax, New Delhi vs. Mitsubishi Corporation [2021] 130 taxmann.com 276 (SC)**. As for interest under section 234C it was submitted that interest is applicable on returned income, accordingly, AO has erred in levying interest under section 234C. Even otherwise, grounds challenging levy of interest are consequential and, accordingly, adjudicated in favour of the assessee.

25. Thus, when we have concluded and sustain the key contention that the impugned international transaction involving FTS receipts are not taxable in the absence of FTS clause in India-Thailand DTAA and as the appellant does not have a PE in India. The grounds arising out of the challenge of the order of the TPO vide Grounds No. 6 to 10 have to be sustained also for reason that international transactions including impugned international transaction involving FTS receipts have already been benchmarked in Honda Cars India Ltd. and Transfer Pricing Study stands accepted by TPO. Thus grounds No.6 to 10 also deserve to be allowed.

26. As a consequence of the above discussion, the appeals in hand are allowed.

Order pronounced in the open court on 23.07.2024.

Sd/-

**(G.S.PANNU)
VICE PRESIDENT**

Sd/-

**(ANUBHAV SHARMA)
JUDICIAL MEMBER**

Date:- 23..07.2024

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4. CIT(Appeals)
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**ASSISTANT REGISTRAR
ITAT, NEW DELHI**