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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 441/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 .....Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha Chaudhary & Ms. Naincy Jain, Advs.

versus

FCC CO. LTD. .....Respondent

Through: Mr. Ajay Vohra, Senior Adv. with Mr. Prakash Kumar & Ms. Rashmi Singh, Advocates.

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\+ ITA 442/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 .....Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha Chaudhary & Ms. Naincy Jain, Advs.

versus

FCC CO. LTD. .....Respondent

Through: Mr. Ajay Vohra, Senior Adv. with Mr. Prakash Kumar & Ms. Rashmi Singh, Advocates.

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\+ ITA 444/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 .....Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha Chaudhary & Ms. Naincy Jain, Advs.

versus

FCC CO. LTD. .....Respondent

Through: Mr. Ajay Vohra, Senior Adv. with Mr. Prakash Kumar & Ms. Rashmi Singh, Advocates.

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\+ ITA 651/2023

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 .....Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha Chaudhary & Ms. Naincy Jain, Advs.

versus

FCC CO. LTD. .....Respondent

Through: Mr. Ajay Vohra, Senior Adv. with Mr. Prakash Kumar & Ms. Rashmi Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **23.07.2024**

1. These appeals assail the order of the Income Tax Appellate Tribunal [“**Tribunal**”] and pertain to the following Assessment Years [“**AY**”]:

ITA No.	**Tribunal’s Order date**	**Assessment year**
441/2023	09 March 2022	2014-15
442/2023	26 December 2022	2017-18
444/2023	09 March 2022	2015-16
651/2023	19 April 2023	2020-21

2. The principal question which is sought to be addressed before us pertains to the findings returned by the Tribunal with respect to

Fixed Place Permanent Establishment ["**PE**"] and Supervisory PE. Insofar as the question of Fixed Place PE is concerned, the Tribunal has while bearing in mind the decision rendered by the Supreme Court in **Formula One World Championship vs CIT**[1], held as follows:

> "**12.3** In the present case, FRL is alleged to be the place of business from which the business of the assesee 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 assesee 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 assesee 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 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

[1][(2017) 17 SCC 602]

India."

3. Proceeding further to deal with the argument of Supervisory PE, the Tribunal has ultimately found that although the employees of the foreign principal were visiting India, they were clearly not involved in supervising any installation or assembly project. It becomes pertinent to note that Article 5(4) of the **India-Japan Double Taxation Avoidance Treaty**[2] does not speak of supervisory activities as a broad genre. The said supervisory activities must be in connection with a building site construction, installation or assembly project. Undisputedly, and as per the facts which have been recorded by the Tribunal, none of those would stand attracted to the operations of the respondent-assessee.

4. We in this respect deem it apposite to extract paras 13, 13.1, 13.2, 13.3 and 13.4 of the order of the Tribunal impugned before us:

> "**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 Service s (RFT) of the respective employee. The said

[2] DTAA

Annexure 1 and Annexure 2 are on record.

13.2 Perusal of the above documents shows 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 realting 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 the there is no Supervisory PE of the assessee for the AYs under consideration.

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

5. In view of the aforesaid, we find that the appeals fail to raise any substantial question of law. They shall, consequently, stand dismissed.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

JULY 23, 2024/kk