

# SATURDAY INTERNATIONAL TAX GYAN !!!

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## FCC Co. Ltd. vs. ACIT

**Mere presence of personnel of a foreign holding in premises of Indian subsidiary to render services cannot constitute, either fixed place or supervisory PE of foreign company.**

**Date: 30.04.2022**

## Facts of the Case

- ❖ Assessee is a foreign company and a tax resident of Japan.
- ❖ The assessee company have a wholly owned subsidiary in India through which assessee earned the following incomes:
  - a) Royalty Income which was duly offered to tax @10%
  - b) Fee for technical services (FTS) under the agreement for dispatch of engineers, which was duly offered to tax @10%
  - c) Income from supply of raw materials, components and capital goods which were not offered to tax as the assessee treated it to be in the nature of business profit and not taxable in India in absence of PE.

# Revenue's Contention

- ❖ Assessee officer contended that assessee has a business connection in India in terms of Section 9(1)(i) of the act and a **Fixed Place PE as well as supervisory PE** in India.
- ❖ AO held that Indian entity's premises serve as a branch and office of the assessee constituting a Fixed Place PE.
- ❖ Further AO submitted that Supervisory PE is created due to the presence of foreign ex-pat in India and their scope of work includes supervisory function.

## Assessee's Contention

- ❖ Assessee submitted that Fixed Place PE is constituted when the premises be at the disposal of assessee and mere right to use the place does not leads to control thereupon.
- ❖ In relation to Supervisory PE it was stated that the employees of the assessee visited India to provide technical support and do not perform any supervisory function.
- ❖ Further assessee argued that neither the goods are manufactured nor sold and nor the consideration is received in India. Thus, the assessee has not carried out any operation in relation to supply of raw material and capital goods in India. Therefore, even if it is assumed that title of goods are transferred in India no attribution of profit from supplies could be made in absence of PE in India.

# RULING

- ❖ **To constitute Fixed Place PE under Article 5(1) following conditions need to be satisfied:**
  - a) The existence of a ‘place of business’, i.e. a facility such as premises;**
  - b) The place of business must be at the disposal of the enterprise;**
  - c) This place of business must be ‘fixed’; i.e. it must be established at a distinct place with a certain degree of permanence; and**
  - d) The ‘carrying on the business’ of the enterprises through this fixed place of business.**
  
- ❖ In the present case, access to Indian entity’s premises to provide services by assessee would not amount to the place being at the disposal of assessee. Such access was for the limited purposes of rendering services to Indian entity without assessee having any control over the said premises.
  
- ❖ Indian entity is an independent legal entity carrying on its business with its own clients for which the assessee provide time to time technical assistant as required by it. The business of the assessee is not being carried out from the alleged Fixed Place PE.

# RULING

- ❖ Supervisory PE as per Article 5(4) of 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.”***
- ❖ Employees of the assessee visited India to assist Indian Entity in relation to supplies made to its customers; resolving problems relating to production, fixing and maintenance of machines, checking safety status at the premises; 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.**
- ❖ Also, no installation or assembly project was on going at Indian entity’s premises. It is in the existing business since many years and no new line of business has been launched by them. The employees were not rendering any services in connection with building site or a construction project or an installation project or an assembly project.

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## Transaction Between Assessee and Indian Entity.



FCC Co. Ltd. (Japan)

1 FTS under the agreement for dispatch of engineers 

2 Royalty under license agreement

3 Supply of raw material components and capital goods



FRL Co. Ltd. (India)  
Wholly Owned Subsidiary

**Whether supervisory PE is attracted in India?**  
No, in the present case no installation or assembly project was on going at Indian entity's premises .  
The employees visited India to render certain technical services.

**Whether fixed PE is attracted in India?**  
No, as in the present case assessee has rendered services without having any control over the said premises .



# OUR COMMENTS

- ❖ In case of any business income, even if a foreign entity constitutes PE in India, then also only so much of income will be taxable which is linked or attributable to such PE in India.
- ❖ For Eg: If a company has a branch PE in India for providing support services and it is directly selling goods to Indian customers from its business place outside India, then income earned from sale of such goods will not be taxable in India as sale of goods is not attributable to the Indian PE.
- ❖ Hence, just having a PE in India will not make entire income of a foreign company from India taxable in India but only such services or supplies which are provided from such PE will be taxable in India.

<b>Section/Article</b>	9(1)(i) of the Income Tax Act, Article 5, 7
<b>DTAA/Country</b>	India – Japan DTAA
<b>Court</b>	Delhi Tribunal
<b>Date of decision</b>	09.03.2022

**Note:** Case law name in **Red**- in favour of the revenue, **Green**-In favour of the Assessee, **Orange** = Partial



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