$~29, 30, 32, 43 & 44

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

Date of Decision: 02.12.2019

\+ **ITA 969/2019**
\+ **ITA 970/2019**
\+ **ITA 972/2019**
\+ **ITA 973/2019**
\+ **ITA 974/2019**

ROLLS-ROYCE PLC ..... Appellant
Through: Mr.Percival Billimoria, Mr.SR Patnaik, Mr.Thangadurai VP and Mr.Sidharth Thakur, Advocates

versus

DEPUTY DIRECTOR OF INCOME TAX, CIRCLE-2(1), INTERNATIONAL TAXATION, NEW DELHI ..... Respondent
Through: Ms.Lakshmit Gurung, Senior Standing Cousnel with Mr.Talha A Rahman, Mr.Siddharth Gupta and Mr. Shaz Khan, Advocates

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (Oral):

1. The present appeal is preferred by the assessee against the common order passed by the Income Tax Tribunal Delhi Bench "I-2" New Delhi dated 28th May, 2019, in several ITAs preferred before it, pertaining to the assessment years 2004-05, 2005-06, 2006-07, 2007-08 & 2009-10. The Tribunal has rejected the said appeals preferred by the appellant, inter alia, on the premise that this Court has held in favour of the revenue vide its decision dated 30th August, 2011 reported as ***[2011] 13 taxmann.com 233 (Delhi) Rolls Royce***

PLC vs. Director of Income-tax (International Taxation) that the Rolls-Royce India Ltd (hereinafter referred to as 'RRIL'), a hundred percent subsidiary of the appellant, constituted Permanent Establishment (hereinafter referred to as 'PE') of the appellant/assessee in India. The Tribunal took note of the fact that the appeal of the appellant against the said decision of this Court is pending consideration before the Supreme Court.

2. Mr. Billimoria, learned counsel for the appellant submits that the Tribunal has erred in proceedings on the basis of the said decision of the High Court, since in taxation matters, concept of res judicata does not apply and each assessment year has to be treated separately and the issues arising in each year have to be considered and examined separately. In this regard he placed reliance on the decision of the Supreme Court in ***M.M.Ipoh vs. Commissioner of Income Tax*** **[1968] 67 ITR 106 (SC).** He submits that the Supreme Court decision in ***Formula World Championship Ltd. vs. Commissioner of Income Tax, (International Taxation)-3 Delhi (*****2017) 394 ITR 80** was rendered after the earlier decision of this Court in the case of the appellant/assessee. He submits that the issue-whether RRIL constitutes PE of the appellant in the light of that decision, needs examination afresh. His further submission is that on the same set of facts, the liaison office of RRIL has been held to be the PE of the appellant, as well as that of RRIL, which is not possible.

3. We have no difficulty in accepting the legal proposition laid down in ***M.M.Ipoh*** **(supra).** However, it was for the appellant to point out as to how the facts pertaining to the relevant assessment years were different from the facts on which the decision was rendered against the assessee, holding that

RRIL constituted PE of the assessee in India.

4. The earlier decision against the appellant-assessee, holding that RRIL constituted its PE in India, pertains to the assessment years 1997-98 to 2003-04. The present appeal pertains to the assessment year 2004-05. The appellant has not been able to point out any pertinent difference in facts prevailing in the assessment year in question, and the assessment years to which the decision of this Court relates.

5. A perusal of the impugned order shows that the Tribunal has, in fact, considered and rejected the same arguments as advanced by the appellant before it. We may extract the relevant portion of the impugned order in this regard:

> *"10. We have heard the rival submissions and also perused the relevant findings given in the impugned orders as well as material referred to before us. Ld. Counsel for the assesse had set out various reasons as to why RRPL cannot be said to having any PE in India mainly for the reason that, it was only supplying aero-engines and spare parts to the Indian customers on principal to principal basis. The service agreement for carrying out various other technical services was between RRIL and RR International and RRIL for has set up a liaison office in India to undertake the relevant service in India, for which was compensated on mark up basis. Thus, the activities of the all the three entities were entirely different. The liaison office of RRIL was neither negotiating any contract for sales nor was carrying out any activity relating to sales. Neither the LO was in any manner at the disposal of RRPL even for its employees. Thus, in view of the judgment of Hon 'ble Supreme Court in the case of* ***Formula World Championship Ltd. v. Commissioner of Income-tax, (International Taxation)-3, Delhi, (supra) and ADIT vs. E funds IT Solution Inc., (supra),*** *there cannot be any PE in form of LO. Even though we may slightly feel persuaded by*

his argument that PE has to be seen qua the activities carried by a foreign enterprise in India through a fixed place business or nay such place which is at its disposal, however, ***precisely the same issue had come up for consideration in assessee's own case before this Tribunal on similar set of facts, wherein Tribunal after detailed reasoning and finding has held that the liaison office of RRIL also constitutes a PE for the assesse, i.e., RRPL in India.*** *The Hon'ble Delhi High Court though has upheld the order of the Tribunal, however has noted that the issue of PE was not pressed or argued. Now that this matter is pending before the Hon 'ble Supreme Court as informed by the Ld. Counsel, therefore, as a matter of judicial precedence, we cannot take a different view and decide the issue a fresh taking any other view. Another set of argument placed by the ld. counsel before us is that the PE of assessee was in fact liaison office of RRIL in India, which is separately assessed to tax in India and its profit and taxability now has attained finality in the form of agreement under MAP. It was also submitted that notwithstanding whether there IS any independent PE of assessee in India or not, but the same activities arising from the same set of facts as alleged by the Revenue cannot give rise to two PEs, i.e., one PE for the assesse and another PE for RRIL. To canvass this point the ld. counsel has drawn our attention to the various findings of ld. CIT(A) in the case of RRIL and remand report of AO as contained in the appellate order dated 15.02.2009. He has pointed out that in the said order the ld. CIT(A) has relied upon same contents of report of survey conducted at the LO office of RRIL and exactly the same material has again been used in the case of the assessee also; and therefore, for the same activity there cannot be two PEs for two different entities. As culled out from the records, the survey of RRIL office in India had revealed certain facts which has been used by the Revenue authorities for holding that Rolls Royce Group has a PE in India.* ***The contents of the survey have been discussed by this Tribunal in its order and have reached to the following conclusion****:-*

"It can, therefore, be summarized that in the light of the facts as well as document mentioned above, RRIL's presence in India is, a permanent establishment of appellant because:
(a) It is a fixed place of business at the disposal of the Rolls Royce Plc and its group companies in India through which their business are carried on.
(b) The activity of this fixed place is not a preparatory or auxiliary, but is a core activity of marketing, negotiating, selling of the product. This is a virtual extension/ projection of its customer facing business unit, who has the responsibility to sell the products belonging to the group.
(c) RRIL acts almost like a sales office of RR Plc and its group companies.
(d) RRIL and its employees work wholly and exclusively for the Roll Royce Plc and the Group.
(e)RRIL and its employees are soliciting and receiving orders wholly and exclusively on behalf of the Rolls Royce Group
(f)Employees of Rolls Royce Group are also present in various locations in India and they report to the Director of RRIL in India
(g) The personnel functioning from the premises of RRIL are in fact employees of Rolly Royce Plc. This has been admitted by the MD. Mr. Tim Jones, GM, and can be discerned from statement of Mr. Ajit Thosar and documents like terms of employment of GMs.
Thus, the appellant can be said to have a PE in India within the meaning of Article 5(1), 5(2) and 5(4) of the Indo UK DTAA. Since we have found that the appellant has a business connection in India as well as PE in India the income arising from its operation in India are chargeable to tax in India."

11. Since the finding of fact has been arrived on the basis of same documents, we cannot subscribe to a different view and accordingly, respectfully following the same, we hold that assesse did have a PE in India." *(emphasis supplied)*

6. Thus, it would be seen that the finding returned by the ITAT-that RRIL constituted the PE of the appellant is primarily a finding of fact based on the

appreciation of evidence. No change in the factual matrix is pointed out by the appellant, and the finding returned does not raise a substantial question of law.

7. The further submission of Mr. Billimoria is that the amendment incorporated in the second explanation in section 9(1) of the Income Tax Act with effect from 1st April, 2019 would not have retrospective application. This submission has no merit. This is for the reason that while determining the issue whether RRIL constituted the PE of the appellant-assessee, the authorities have not relied upon the said explanation at all, and the determination of the said issue was undertaken *dehors* the said explanation, upon appreciation of the evidence unearthed during the survey. The explanation may, or may not, be prospective. In any event, the same would certainly not have the effect of nullifying the determination made on the issue of PE on the basis of the evidence collected and the pre existing law as prevalent prior to the amendment of Section 9(1) with effect from 1st April, 2019. That, clearly, is not the purport of the substituted Clause (a) of Explanation-2 to Section 9(1) of the Act, with effect from 1st April, 2019.

8. Another argument advanced by Mr. Billimoria is that the income of the assessee, on the basis that RRIL constituted its PE, has already been subjected to tax in the hands of PE i.e. RRIL, and the revenue is seeking to tax the same again. This submission has no merit. Firstly, this aspect does not raise a substantial question of law, since it is clearly a factual issue. Secondly, the order of the CIT(A) dated 15th February, 2009 was available when this Court rendered its decision on 30th August, 2011 in the case of the

assessee, as taken note of hereinabove. No such plea was raised then. It is not open to the appellant to raise it now. We also find that the Tribunal has considered this submission in the impugned order in Paragraphs No. 12 and 13, which read as follows:

> *"12. Lastly, in so far argument of the Ld. Counsel of the assessee that no further profit attribution of PE should be made once for the same activity, profit attribution has been agreed upon in MAP, therefore, no separate attribution can be made in the hands of the assesse, we are unable to accept the contention of the ld. Counsel, because there is huge difference between the activities of RRIL and RRPL. Though, same set of material and documents have led the revenue for holding LO as PE of RRIL and also of RRPL. But, if there is no interlacing of activities of two entities, then activity of one entity cannot result into PE of another entity, because to establish a PE the business carried out by a foreign entity alone should be taken into consideration. Here in this case if it has been found by the Tribunal that independently also the activity of assessee was somehow linked with LO, therefore, no interference can be made and since this issue has been decided against the assesse we do not find any reason to go into further deep analysis and form a different view, because there is no material change in facts and circumstances.* ***RRIL activities was carrying out sales and marketing in India for RR International and nothing has been produced before us to show that these activities were also assessed as business PE on a profit split or appropriate method. The record shows that RRIL was assessed only as a dependent agent and a service PE on the cost plus margin basis and therefore, it cannot be concluded that the attribution of PE in India is fully exhausted by the assessment of RRIL or nothing remained to be assessed in the hands of the assessee. Once there is a finding that activities of LO have resulted in PE in India, then tax attributable to such activity must be brought to tax in India. If activities give rise to PE which undertakes marketing and sales in India then tax attribution of the PE must be made. Here the attribution in the hands of RRIL was only limited to cost plus***

basis, whereas in the case of the assesse the profit which has been attributed relates to purely sales of engines and parts. *Further, nothing has been brought before us that under the MAP agreement the profit attribution of sales of RRPL were also subject matter of consideration or discussion and there cannot be any assumption that the quantum of tax agreed in the case of RRIL exhausts the contribution of profit to the PE of assesse in India.*

13. In so far as attribution of profit is concerned, we are of the opinion that such a blanket attribution as done by the authorities below does not seems to be on a sound footing, especially when they have alleged that common activities were carried out from the LO. Then in that case, it would not possible to distinguish as to which activities of LO pertains to RRIL or activities of LO were undertaken on behalf of the assessee and what part of activities at the LO which assessee itself was executing for its sale. That being so, then ostensibly attribution of the profit to the activities in India of the assessee logically should be deducted by the amount attributed to RRIL. But we do not wish to give any finding or direction in this regard and we still persuaded by the earlier years precedence, wherein the Tribunal has separately attributed profits in the hands of the assesse company wherein they have adopted 35% of the profit as against 75% of the global profit in respect of sales affected in India as done by AO."

(emphasis supplied)

9. Therefore, the questions of law urged by the appellant, do not arise for consideration.

10. The appeals are accordingly, dismissed.

VIPIN SANGHI, J

REKHA PALLI, J

DECEMBER 02, 2019
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