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

BEFORE SHRI PRAKASH CHAND YADAV, JUDICIAL MEMBER
AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No.1407/Del/2025
(ASSESSMENT YEAR 2022-23)

Mitsui Mining and Smelting Company Limited, 1-11-1 Osaki Shinagawa Ku, Tokyo Japan. PAN-AAGCM6125M	Vs.	The Asst. CIT, Circle-2(2)(1), International Taxation, Delhi.
(Appellant)		**(Respondent)**

Assessee by	Shri S.K. Agarwal, Adv.
Department by	Shri Nikhil Kumar Govila, CIT-DR
Date of Hearing	15/07/2025
Date of Pronouncement	31/07/2025

O R D E R

PER PRAKASH CHAND YADAV, JM:

The present appeal of the assessee is arising out of the order of Ld. Assessing Officer dated 21 January, 2025 having DIN & Order No. ITBA/AST/F/1440/2023-24/1063757468(1) dated 31/03/202 and relates to Assessment Year 2022-23.

2. Brief facts of the case as coming out from the orders of the authorities below are that the assesse is a non-resident company incorporated/established in Japan in 1950. It is engaged in the business of manufacturing and sale of functional engineered materials and electronic materials. It also engaged in extractions of non-ferrous metal smelting, minerals resource development, precious metal recycling, raw material related business, manufacturing and sale of automotive parts/component etc. The assessee company is having a subsidiary in India, Mitsui Kinzoku Components India Private Limited [hereinafter referred to as ('MKCI')]. The subsidiary of India is engaged in the

business of manufacturing Catalytic convertors and selling catalytic convertors in India. These convertors are used in automobile industries. The assesses herein before us used to provide certain precious metal/chemicals as Offshore sales to its India subsidiary. For the impugned Assessment Year, the assessce has filed return of income declaring total Income of Rs.152.26 Cr. on 29th November, 2022. The case of the assessee was selected for scrutiny. During the course of assessment proceedings, the Assessing Officer observed that the assessee has received royalty as well as fee for technical services from the Indian subsidiary, and has offered these amounts as its income for the impugned assessment year. The Assessee Officer further observed that assessee has received certain receipts from the Indian subsidiary on account of reimbursement of expat (seconded employees) remuneration. The Assessing Officer further observed that the assessee has seconded certain Japanees personal to its India subsidiary. It is an admitted position of fact that the seconded employees were getting salary from the Indian company and they were offering this salary income for taxation in India. These employees were getting part of their salary herein India and part of their salaries in Japan via present assessee. In simple terms, the Indian subsidiary is reimbursing that portion of salary which the assessee is paying to the seconded employee in Japan, on behalf of the Indian subsidiary. In the back drop of these facts, the Assessing Officer. after analyzing the agreements of seconded employees between assessee and the India subsidiary held that the employees of the assessee were exercising complete control over the physical premises of the Indian subsidiary and also carrying out sales operations in India and, hence, the assessee is having Permanent Establishment (PE) in India. The Ld. AO further took a view having regard to the fact that the assessee is having full control over the premises and structure of Indian Subsidiary the Indian subsidiary constitute the PE of assessee in terms of Article 5 of India Japan Treaty.

3. Aggrieved with the order of the AO, the assessee filed an appeal before the DRP and argued that the view of the AO that by arranging seconded employees, for the purposes of smooth running of business of the Indian subsidiary assessee is having PE in India is not correct. Before the DRP it has been further argued that as per provisions of Article 5(9) of India/Japan Treaty for having a PE in India, mere control of one company by another company (foreign) would itself will not constitute permanent establishment and it is standard practice to form subsidiary all over the world for running the business of enterprises smoothly. Counsel for the assessee further argued before the Ld. DRP that the interpretation of the agreements by the lower authorities is not legally correct. However, Ld. DRP affirmed the view of the AO vide its order dated 17th December, 2024.

4. Aggrieved with the order of DRP, the assessee has come up in appeal before us and has raised following grounds of appeal: -

"Based on the facts and circumstances of the case, Mitsui Mining and Smelting Company Limited (the Appellant) respectfully appeals against the order passed by Assistant Commissioner of Income Tax. Circle-2121(1), International Taxation, New Delhi ('Ld. AO') under section 1440(13)/ 143(3) of the Income tax Act, 1961, (the Act) on the following grounds, which are without prejudice to each other:

**1. On the facts and in the circumstances of the case and in law, the Ld. Assessing Officer (Ld. AO') and Ld. Dispute Resolution Panel (Ld. DRP") has erred in not completing the assessment proceedings as per time limit prescribed u/ s153(1) read with section 153(4) of the Income Tax Act, 1961 (the Act'), thereby making the assessment proceedings barred by limitation.*

2. On the facts and in the circumstances of the case, the Ld. AO and Ld. DRP have erred in concluding that Appellant Company constitutes Fixed Place Permanent Establishment (PE) in India under the Act as well as Article 5 of India-Japan Tax Treaty through its employees seconded to Indian Subsidiary Company, working from the office spaces of such Indian Subsidiary Company.

2.1. On the facts and in the circumstances of the case and in law, the Ld. AO and Ld. DRP have erred in concluding that the Appellant Company is de-facto controller and actual employer of employees seconded to Indian Subsidiary Company te Mitsui Kinzoku Component India Private Limited ("MKCI") and there is no employer employee relationship between MKCI and seconded employees

2.2. On the facts and in the circumstances of the case, the Ld. AO and Ld. DRP has erred in concluding that Appellant Company is exercising significant economic

control over the seconded employees and such employees, holding top management positions at MKCI, are exercising significant control and dominance over the affairs of MKCI, on behalf of Appellant Company"

5. At the time of hearing, Ld. Counsel for the assessee first argued the merits of the additions made by the AO and then made a request that ground related to the issue of limitation may kindly be decided thereafter.

6. In Ground Nos.2 & 3, the assessee has challenged the action of the AO with respect to the view that the assessee is having PE in India. Ld. Counsel for the assessee pointed out that in the assessment of Indian entity i.e., MKCI's, the Department has accepted the payments of salary made to the seconded employees, department has also not disputed the deduction of tax at source with respect to the salaries paid to the employees and, therefore, the view of the AO that they were under the control of the assessee i.e. foreign company is legally not tenable. Counsel for the assessee further argued that for constituting the PE two conditions are *sine qua non*.

(a) There must be a fixed place of the entity

(b) From such fixed place business would be carried on by such entity, if anyone conditions is absent then there cannot be any PE in India.

7. Ld. Counsel for the assessee further drawn the attention to the Bench to the secondment employee's agreement appointment letters given by the India entity to the seconded employee, letter of release given by the Assessee before transferring those employees to India and argued that the view of the AO as affirmed by the DRP is not legally tenable. Ld. Counsel for the assessee has also filed the synopsis in order to assist the Bench has relied upon various judgments of the High Courts as well as the Tribunal.

8. Ld. DRP relied upon the orders of the authorities below i.e., the Assessing Officer and the DRP.

9. We have heard the rival submissions and perused the materials available on record. We have also gone through the judgments relied upon by the assessee's Counsel. The solitary issue involved in these appeals is whether secondment employees of the India entity were in fact under the control of the assessee and hence the assessee would be having PE in India. Careful perusal of certain clauses of the secondment agreement dated 1st April, 2019 (prior to the judgment of the Hon'ble Supreme Court in the case of Northern Operating Systems (P.) Ltd. in the case of C.C.E & S.T. Bangalore Vs. Northern Operating System (P.) Ltd. (Civil Appeal Nos. 2289-2293 of 2021) would show that the view of the AO and DRP is not correct. For instance, perusal of the certain clauses of this agreement would provide the scope of agreement which says that the "Shukko-sha", which means secondment employees shall integrated into the business MKCI the Indian entity as its own employees to facilitates of its business operations in India. Similarly, Article 4, clause 4.1 would show that secondment employee shall work as full-time of employee and MKCI and work solely under the control, directions, skill, responsibility and supervision of MKCI. Clause 4.2 of the agreement further clarified that the "Shukko-sha" shall work in their personal capacity and not for and on behalf of MMS. Cumulative reading of all these clauses of the agreement would show that there was no employer-employe relationship between the assessee and the secondment employees. We further observe, that the MKCI is the sole controlling authority, and can exercise determination of their (secondment employees) services. It is further clarified that Clause 5.5 of the agreement that the assessee is not at all responsible for the losses, if any, occurred to the India entity due to the action of secondment employees. In other words, the vicarious liability of assessee vis-à-vis damaged caused by the secondment employee is not there at all. Similarly, clause 5.6 of the agreement clarified that assessee will not have any right to use, maintenance

of disposal of any structure or asset of MKCI or any right over any employee of MKCI. All these clauses when perused would prove beyond doubt that the assessee was neither having any control over the employees seconded by it to Indian entity nor the assessee was having any control over the asset/structures of the Indian entity and, therefore, in our view, there cannot be any fixed place PE of the assessee in India by virtue of supply of these secondment employees. We would further like to observe that as per the definition of PE, as given in Article -5 of the India-Japan treaty down conditions i.e., presence of fixed place and carrying of business through that place is a condition precedent for holding PE of a nonresident in India. These conditions are not fulfilled in the present case. Hence, we are of the view that the Ld. DRP as well as AO has erred in law in holding that the assessee was having PE in India.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 31/07/2025.

Sd/-	Sd/-
(NAVEEN CHANDRA)	**(PRAKASH CHAND YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated:31/07/2025
PK/Ps
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI