IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

Before Shri R.S. Padvekar, Judicial Member,
and Shri R.K. Panda, Accountant Member.

ITA.Nos.786 to 790/PN/2012
(Assessment Years : 2000-01 to 2002-03 & 2004-05 to 2005-06)

Dy. Director of Income Tax
(International Taxation)-I, Pune .. Appellant

Vs.

Epcos AG, Germany,
C/o. EPCOS India Pvt. Ltd.,
E-22-25, MIDC, Satpur,
Nashik-422007
PAN No.AAACE9787H .. Respondent

ITA No.812/PN/2012
(Assessment Year 2004-05)

Epcos AG, Germany,
C/o. EPCOS India Pvt. Ltd.,
E-22-25, MIDC, Satpur,
Nashik-422007
PAN No.AAACE9787H .. Appellant

Vs.

ACIT, Circle-2, Nashik .. Respondent

CO No.25 to 28/PN/2013
(Assessment Years : 2000-01 to 2002-03 & 2005-06)

Epcos AG, Germany,
C/o. EPCOS India Pvt. Ltd.,
E-22-25, MIDC, Satpur,
Nashik-422007
PAN No.AAACE9787H .. Cross Objector

Vs.

Asst. Director of Income Tax,
(International Taxation)-I, Pune .. Appellant in the appeal

Assessee by	:	Shri Sunil M. Lala & Shri Keerthiga Padmanabhan
Revenue by	:	Shri P.L. Pathade
Date of Hearing	:	10-03-2014
Date of Pronouncement	:	26-03-2014

ORDER

PER BENCH:

The above appeals filed by the Revenue and the Cross Objections filed by the assessee for A.Y.2000-01 to 2002-03 & 2005-06 and Cross appeal for A.Y. 2004-05 are directed against the common order dated 20-10-2011 of the CIT(A)-I, Pune relating to Assessment Years 2000-01, 2001-02, 2002-03, 2004-05 & 2005-06. For the sake of convenience, all these appeals were heard together and are being decided by this common order.

ITA No.786/PN/2012 (A.Y. 2000-01) :

2. Grounds of appeal No.1and 2 by the Revenue read as under :

> "1) On the facts and in the circumstance of the case, the CIT (A)-l, Pune erred in holding that assessee does not have a permanent establishment (PE) in India dehors the finding of the A.O. that the functions of EPCOS AG are performed through the Indian Subsidiaries by issuance of directions through email etc. and the entire spectrum of activities of the Indian Subsidiaries are monitored by the assessee, thus having control and management of Indian Subsidiaries and thereby constituting a PE in India.
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> 2) On the facts and in the circumstances of the case, the CIT (A)-l, Pune erred in law by concluding that a Double Taxation Avoidance Agreement [DTAA) is an alternative taxation regime and not an exemption regime and that DTAA is for the purpose of shifting onus on the department to prove to the contrary in respect of the exemption claimed by the assessee."

2.1 Facts of the case, in brief, are that the assessee company, Epcos AG, Germany is a foreign, non resident, multi-national company having its headquarter at Munich, St. Martin Street 53, Germany. It is a tax resident of Germany. The assessee is engaged in designing, manufacturing and marketing of electronic components and modules having a focus on fast growing leading edge technology markets. This company is known for its superior products in the segment of capacitors, ceramic components, capacitors and inductors etc. It has manufacturing plants, research and design centers, sales offices and other properties in different parts of the world. In India, it has established two subsidiaries viz. Epcos India Pvt. Ltd., Nasik (hereafter known as EIPL) and Epcos Ferrites Pvt. Ltd., Kolkatta (EFPL). EFPL has now merged with EIPL and therefore, presently only EIPL, Nashik exists as a corporate body in India. EIPL is separately assessed to tax as a resident Indian company for its operations carried out in this country. The assessee company filed its return of income on 1.11.2004 declaring taxable income of Rs.18,32,15,432, comprising of items (a) to (e) of the table given below and offered tax @ 10% as per Article 11 and 12 of India-Germany DTAA, as withheld by its Indian Subsidiaries :

Received from EPCOS India Private Limited		
S.No.	Particulars	Gross Amount in Rs.
(a)	Royalty	99,55,167
(b)	Product Marketing Services	6,57,33,995
(c)	Information Technology Services	4,94,37,968
(d)	Technical Services	2,65,75,812
(e)	Interest received on ECB loan	3,15,12,490
	Total	18,32,15,432

2.2 In respect of the various payments made, it was explained by the assessee that the same were basically for rendering services by the assessee company from overseas under respective agreements entered into by the assessee with the Indian subsidiaries or Group companies. These were specifically stated to be as under:

i. Information Technology (IT) Support Services for both the subsidiaries effective 01.04.2001 for EIPL and 01.10.2002 for EFPL.

ii. Product Marketing Services for both the subsidiaries effective 01.04.2001 for EIPL and 01.10.2002 for EFPL.

iii. Sales Support Services for EFPL effective 01.10.2002.

iv. The assessee has also entered into technical collaboration agreement with EIPL dated 06.05.1996 and EFPL dated 13.10.1993, pursuant to which it received royalty / fees for technical services as a percentage of sales.

2.3 The assessee claimed that it has also received money from all its subsidiaries situated around the world including the Indian wholly owned subsidiaries (WOS) under an agreement made relating to Project MOVE effective from 1.4.2002. Therefore, in addition to the receipts made as indicated in the table above amounting to Rs.18,32,15,432, the assessee company also received a sum of Rs.24,38,72,088 claimed as reimbursement of cost for project MOVE. The assessee claimed that this income was not offered to tax in the return as it was only for reimbursement of the expenses incurred on their behalf by the assessee company as a team leader. Therefore, it can be seen that the assessee actually received the following India source income during the year under consideration from its WOSs situated in India.

Nature of Income	Amount (INR)
i. Royalty	99,55,167
ii. IT, Marketing and Sales support	11,51,71,963
iii. Technical Services	2,65,75,812
iv. Interest on loan	3,15,12,490
v. Reimbursement of costs Project MOVE	24,38,72,088
Total	42,70,87,520

2.4 The Assessing Officer following his order for A.Y.2003-04 and directions received u/s.144A completed the assessment u/s 143(3) of the IT. Act on 29.12.2006. In the directions issued u/s.144A it was held that the assessee has a PE in India in the form of its WOSs under Article 5 of the India-Germany DTAA and therefore, the taxable income of the assessee are assessable as business profits under Article 7 of the DTAA and not under Article 11 and 12 of the DTAA. Therefore, the income was held to be taxable @ 20% u/s 44D r.w.s. 115A of the IT. Act without allowing any deduction in respect of any expenditure or allowance.

2.5 The Assessing Officer following his order for A.Y. 2003-04 held that the assessee has a PE in India and the assessee has a business connection in India u/s.9(1)(i) of the Income Tax Act, 1961. Further, the assessee is in the receipt of income from this business connection (in the form of royalty income). Hence, he was of the opinion that this income is deemed to accrue or arise in India u/s.9(1)(i) of the Act and is included in the total income of the assessee u/s.5(2) of the Act.

2.6 Before CIT(A) it was argued that the facts of the assessee's case under appeal are similar to A.Y. 2003-04 and A.Y. 2006-07 wherein the primary issue raised vide Ground No. 1 above has been decided by the Hon'ble ITAT, Pune in favour of the assessee. It was argued that even CIT(A)-II, Nasik, who has decided the assessee's appeal for A.Y. 2003-04 vide appeal No. NSK/ACIT/Cir.2/179/06-07 dated 22.12.2006 has also decided this ground in favour of the assessee. The finding of the

CIT(A) given in A.Y. 2003-04 was upheld by the ITAT in the appeal filed by the Department. In A.Y. 2006-07, the Assessing Officer and the DRP refused to follow the finding given by the ITAT and the CIT(A) given in A.Y. 2003-04 but the Hon'ble ITAT, Pune in appeal filed by the appellant in ITA No. 1413/PN/2010 for A.Y. 2006-07 dated 6.4.2011 has once again followed the finding given in A.Y. 2003-04. In view of the above, it was argued that the finding given by the Assessing Officer that the WOSs of the assessee constitute PEs in India of the assessee company under Article 5 of the DTAA, has to be reversed. It was further submitted in the above context that the assessee has no office, branch or employees based in India and all the services rendered by it to the WOSs are from overseas. The Indian WOSs are manufacturing entities having their own operational framework for manufacturing, management and the independent tax assessments.

2.7 Based on the arguments advanced by the assessee the Ld.CIT(A) accepted the claim of the assessee that the assessee does not have a PE in India. He further held that DTAA is an alternate taxation regime and not an exemption regime and that DTAA is for the purpose of shifting onus on the department to prove the contrary in respect of exemption claimed by the assessee. The relevant observations of Ld.CIT(A) are as under :

> "4.3. The relevant portion of the finding given by CIT(A)-II, Nashik in appeal No. NSK/ACIT/Cir.2/179/06-07 dated 22.12.2006 for A.Y. 2003-04, relating to the above ground and relied upon by appellant were considered and it was found that the Ld. (A)-ll, Nasik has held the following in para 14 to 23 of his order:
>
> **i. The Indian WOSs do not constitute Place of Management PE of the Appellant under Article 5(2)(a) of the India-Germany DTAA:**

In Para 14 and 15 of his appellate order, the CIT(A) has held that performance of business activities or ownership does not qualify as place of management and the AO seems to have got confused with consumption of services with carrying out of business.

ii. The Indian WOSs are not Branch PE of the Appellant under Article 5(2)(b) of the India-Germany DTAA: In Para 16 of his appellate order, the CIT(A) has held that the subsidiaries are not Branch of the Appellant as they are independently incorporated and managed.

iii. The Emails correspondences do not indicate that each and every activity of the Indian WOSs is supervised by the Appellant resulting in constitution of the PE of the Appellant: In Para 19, the CIT(A) concludes,

"From the above correspondence it is clear that there is no active supervision of EPCOS AG in India. These are routine correspondence and emails between the assessee and the subsidiaries in India regarding the product marketing. This correspondence deals with a very limited aspect of business of Indian subsidiaries and therefore the A.O. wrongly concluded that each and every activity of the Indian subsidiaries is done under the active supervision of EPCOS AG in India. It is also to be mentioned here this correspondence has no reference to the activities such as finance. H.R, designing, training etc., Therefore, it is difficult to understand how the AO could come to the conclusion that the business of the subsidiaries controlled by the EPCOS AG. Thus, there is no strength in the argument of the A.O. that the letters and emails received show that the activities are done under the supervision of CPCOS AG".

iv. **The Indian Subsidiaries are not PE of the Appellant:** In paragraph 21 and 23, the CIT(A) has held that no subsidiary can be PE of the holding company simply by virtue of the fact that it is being controlled by the foreign company pursuant to Article 5(7) of the India-Germany DTAA. The relevant portion of Article 5(7), of the aforesaid DTAA which was relied upon by the Ld. CIT(A) for making the above conclusion is reproduced below:

"5(7). The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other."

4.4 In addition to the above, the appellant also invited my attention to the key findings given by the Hon'ble ITAT in appellant's own case in A.Y. 2003-04 on an appeal filed by the Department in ITA No. 398/PN/07 dated 30.6.2008, relating to the above issue. For ready reference, the relevant portion of the said order of the Hon'ble ITAT is also quoted below :

"35. The case of the Assessing Officer, as evident from his observations at page 25 of the assessment order, is that since the taxpayer has accepted that "based on guidance of our product marketing team, activities relating to decisions of sale, production, dispatch, cost computation and other relevant activities for effecting the sale are carried out by the El PL and EFPL" and that "based on guidance and support of our central IT team, local activities such as solving day-to-day problems, monitoring the network, etc. are carried out by the employees of EIPL and EFPL. It **is clear that the taxpayer company is rendering services through the employees** of EIPL and EFPL. **On this basis, the AO has inferred that the taxpayer company has used its Indian subsidiaries, and particularly employees of its Indian subsidiaries, to earn the monies by way of fees for product marketing services, sales support services and information technology services.** The AO's case thus is that the assesses has a fixed place of business, in the form of Indian subsidiaries, that the employees of these Indian subsidiaries have rendered services for which payment is actually made to the taxpayer company and that, for these reasons, the subsidiaries should be treated as PE of the taxpayer company.

Did the assessee company have a PE in India?

36. **There are several fallacies in the line of reasoning adopted by the AO.** The taxpayer before us has received payments for support services and not the functions of the,, subsidiaries. It is not the case that the taxpayer company was supposed to handle entire marketing function or entire information technology function and a part of this work was delegated by the taxpayer company to the employees of the subsidiary. The payment which is made to the taxpayer company is only for the services rendered by the taxpayer company—either directly or through the intervention of a third party. This payment has two elements—one reimbursement of costs, plus, two, a mark up thereon for the indirect overheads. Admittedly, there is no reimbursement of costs incurred on any of the employees in India and as such there cannot be any payment for, or in connection with the services rendered by any India based employee. It cannot, therefore, be, said that any income is earned by way of any employee in India. The business of the taxpayer, so far as impugned receipts are concerned, is rendering services to Indian subsidiaries, in consideration of which the taxpayer gets costs reimbursements plus a mark up. **No part of this business is carried out in India inasmuch as there are no billing raised in connection with any services rendered in India. No doubt, some employees of the Indian subsidiaries work under guidance of the taxpayer company, but the work so done is for the business of the Indian subsidiaries and not for the foreign company which is taxpayer before us.** We must, at this stage, understand distinction between business of the foreign company and that of its Indian subsidiaries. While the business of the foreign company, for our purposes, is rendering certain types of services to its Indian subsidiaries, the business of the Indian company is to manufacture and sell its products. What is done by the employees of the Indian subsidiaries is running business of the Indian subsidiaries which includes marketing of its products — with or without guidance of the foreign parent company, and ensuring a smooth functioning of business by ensuring an effective information technology support service. Just because **employees of Indian subsidiaries are also engaged in marketing activities and information technology support activities, it would not mean that these employees are doing business of the foreign principal unless the work so done by these employees entitles the foreign parent company for Rewards of the work so done.** It is also to be remembered that merely because the foreign parent company is engaged in rendering certain centralized services, it does not mean that all the services are to be rendered by the foreign principal alone or that no part of that work can be done by the employees of the Indian subsidiaries. If Indian subsidiary has engaged the foreign principal for some part of the marketing work, it does not mean employees of Indian

subsidiary will not touch the marketing function at all. In any case, what is paid to the foreign principal is the actual cost incurred by the foreign principal on rendering the services plus a mark up. The services not rendered by the foreign principal, therefore, cannot entitle him to any gains. **Therefore, the situs and manner of rendering of services, by anyone other than the employees or sub-contractees of the foreign principal, cannot govern whether or not the foreign principal will have a PE in India. The entire discussion about the work done by the employees of Indian subsidiaries is not at all germane to the issue of foreign company's PE.**

37. The concept of permanent establishment, as evident from the earlier discussions, is a result of compromise between residence rule and source rule of taxation, and it constitutes 'home' of a foreign enterprise abroad. The core of permanent establishment in the source country consists of (a) fixed place of business of foreign enterprise - its location, as also its permanence; and (b) the business activity of the foreign enterprise. The expression 'permanent establishment' in Article 5(1) of the Indo German tax treaty, as indeed in UN and OCED Model Conventions, is basically defined as "a fixed place of business through which the business of the enterprise is wholly or partly carried on". The expression 'enterprise' in this definition obviously refers to the enterprise of the other contracting state, because the expression 'permanent establishment' has no' relevance when business of enterprise of one of the contracting states is carried on in that very contracting state. In such a situation, the residence country and the source country are the same and there is no conflict in residence rule and source rule, and, therefore, there is no need to resolve the same through the tax treaty provisions. What follows from these discussions is (i) that there should be a fixed place of business in the source jurisdiction, and (ii) that the business of the foreign enterprise should be carried on through such a fixed place of business in the source jurisdiction.

38. The expression 'fixed place of business' is not defined under the tax treaties, but there are negative and positive lists of what the expression 'permanent establishment' does not include and what the expression 'permanent establishment' does include, and these lists can also help us draw inferences on this aspect as well. The expression 'fixed place of business' presupposes that there is a place of business, i.e. a facility such as premises or, in certain instances, even machinery or equipment, and that such a place of business is a 'fixed' place i.e. a distinct place with certain degree of permanence. While in terms of the provisions of Article 5(7), existence of a subsidiary or parent company in the source jurisdiction by itself does not constitute a PE, there is no bar on the parent or subsidiary being PE of each other. The true test, in our considered view, is whether or not business of the foreign enterprise is carried out by the PE. Therefore, when business of enterprises of one of the contracting states is carried out by its subsidiaries in the other contracting states, such a subsidiary can indeed be its permanent establishment. In principle, therefore, there cannot be any bar on a subsidiary being a permanent establishment of the parent company. However, whether or not is it to be treated as a 'permanent establishment of the parent company, must be examined on the facts of the each case. Let us examine what is the case of the revenue before us. The Assessing Officer has, on the basis of perusal of emails exchanged between the taxpayer company and its subsidiaries in

India, has inferred that "each and every activity is done under the active supervision of 'Epcos AG in India'. It is contended that a PE means a fixed place of business through which the business of the enterprise is wholly or partly carried out, and since business is being carried out wholly 'under the guidance and active supervision' and since the taxpayer company has a place of management by way of Indian subsidiaries, the taxpayer company has a PE in India. He has also stated that the Indian subsidiaries are to be treated as 'branches' but then there is no rationale basis for such an aggressive proposition. Undoubtedly, business is being carried out in Indian subsidiaries but the crucial question whose business is it. **The expression 'carrying on of the business' can only refer to the conduct of the business of the foreign enterprise in the source jurisdiction, because the question of triggering tax liability by the virtue of a PE is relevant only for a foreign enterprise; the domestic enterprise is taxable anyway by the virtue of residence rule. What is being done by the Indian subsidiaries under the guidance and supervision of Epcos AG is business of the Indian subsidiaries, and that aspect of the matter, by no stretch of logic, is relevant for deciding whether or not the Epcos AG has a PE in India. Merely because an Indian company conducts its business, with the help and guidance it has received from a foreign company, in India, it does not follow that the foreign company so giving help and guidance will be deemed to have a PE in the form of that domestic company.** Is it necessary that the PE can only be said to exist, under the basic rule, when core business activity is carried out by the PE?

39. We quite agree with the stand of the revenue authorities to the extent that as long as an economic activity is carried out in the fixed place of business available to foreign enterprise, whether such an activity is a core activity or a peripheral activity, it has to be concluded that the foreign enterprise has a PE in the source jurisdiction. Model Convention Commentary states that the activity carried out by the PE may not be a productive character, though the commentary does recognize that it could perhaps be argued that in the general definition, some mention should also be made of the other characteristic of the 'permanent establishment, namely that the establishment must have a productive character- i.e. contribute to the profits of the profits of the enterprise. However, in the present definition, this course has not been taken. Late Prof. Vogel also concurred with this schoold of thought and observed that "....the 'permanent establishment need not be a branch in the nature of facility engaged in activities of the same type as those of the head office organization, nor need the place of business directly contribute to enterprise's profits" and "all that its business must do is to serve the enterprise's overall purpose, but it must be an activity". The question, however, is that the activity must be of the business of the taxpayer company, and not of the independent subsidiaries of such a taxpayer company. **On the facts of the case before us, no part of the work of Epcos AG was carried out in India. The e-mails and letters were sent from outside India, and at best Indian subsidiaries acted upon the advices so given in the e-mails and letters in India. That action of the subsidiaries cannot alter the situs of the activities of the Epcos AG. Does mere existence of PE leads to taxability of income in source country?**

40. It is also important to bear in mind that a non resident company having a PE in India, by itself, does not lead to taxability in India; there must be some profit attributable to such a PE which alone could be taxed in India because of the existence of the PE. When the PE carries on an activity which does not serve overall purpose of the foreign enterprise, or which does not contribute to profits of the enterprise, the existence of such a PE is wholly academic and does not have any tax implications in the source jurisdiction. To that limited extent, there is an inherent contradiction in the OECD approach in as much as one on hand PE provides threshold limits for triggering taxation in the source country, on the other hand the existence of the PE is decided de hors the activity in the absence of which taxability of profits in the source country cannot be triggered at all. On the face of it, when a PE is not engaged in a critical activity having some contribution to overall profits of the enterprise or a revenue generating activity the exercise to ascertain whether or not a PE is in existence is a meaningless ritual and an empty formality. Viewed in this perspective, and bearing in mind the fact that by no stretch of logic it could be held that any significant or critical business activity by the Epcos AG was carried out in India, even if there is a PE in India, that will be wholly academic and will not lead to any taxability of income. Not only the work done in India, if at all, did not constitute significant or critical business activity, the assesses company did not earn any revenues as a result of the activities so carried out by the employees of Indian subsidiaries, and, therefore, no part of the revenues actually generated by the assessee company could be said to be attributable to the PE. The question of existence of PE of the assessee company, in these circumstances, has no impact of taxability of the assessee company.

41. The requirements of exclusion clause under Article 15(5) also highlight this aspect of profit attribution. While we were examining interplay between Article 12 and Article 7, we had noticed that this exclusion clause has twin requirements of (a) existence of the PE through which business is carried out; and of (b) existence of effective connection between such a PE and the rights, properties and contracts in respect of which 'royalties' and 'fees for technical services' are paid. That would mean that only such 'royalties' and 'fees for technical services' are excluded from the scope of Article 12(1) and (2) as are attributable to the PE through which business is carried on by the enterprise. In other words, the taxability under Article 12 shifts to taxability under Article 7 only in respect of 'royalties' and 'fees for technical services' which are attributable to the PE in question. In case an assessee receives 'royalties' and 'fees for technical services' but these receipts do not have an effective nexus with the PE and are not, therefore, attributable to the PE, the exclusion clause under Article 15(5), as also taxability under Article 7(1) and (2) is not triggered.

Conclusion on the first issue i.e. on existence of PE:

41.1 In the light of these discussions, in our considered view, the assessee company did not have any PE in India, much less a PE to which subject 'royalties' and 'fees for technical services' can be attributed. In terms of the India-Germany DTAA, India does not have right to tax these receipts as business profits under Article 7. Of course, in the light of our finding that no revenues earned by the assessee company could be said to be attributable to the PE, even if one was to come to the conclusion that a PE existed, no taxability could arise under Article 7. The assessee has offered the royalties and fees for technical services for taxability in India under Article 12, and, to that extent, admitted tax liability exists. The overzealous approach of the AO has been rightly rejected by the CIT (A). We approve and confirm the stand of the CIT(A), and decline to interfere in the matter."

4.5. On careful consideration of the facts and circumstances available on record along with the applicable law, it is seen that the Assessing Officer, though has tried to strengthen his assessment order in the remand reports submitted during the course of appeal to counter the arguments made by the appellant through their submissions, but in the process the facts of this case has become par/- mater/a to other years including A.Y. 2006-07 wherein the issue of existence of PE was so elaborately discussed by the Assessing Officer in the draft assessment order which was approved by the DRP. The Authorised Representative of the appellant has also agreed to the said fact of the case during the course of appeal. However, during the course of appeal, it was brought on record that the Hon'ble ITAT vide its order dated 6.4.2011 has reversed the finding of the Assessing Officer as well as the DRP in saying that the WOS is the PE of the appellant company. This appeal was decided vide ITA No. 1413/PN/2010 for A.Y. 2006-07 on 6.4.2011. The key finding given in para 9 of the said order of the Hon'ble ITAT is quoted below for ready reference :

"9. Considering the above, we have also examined the comparability of the facts of the case for this year vis-a-vis the assessment year 2003-04. It is a fact that neither the AO, nor the DRP, nor the present CIT-DR were able to demonstrate as to whether the facts of the current year are different in any form with that of assessment year 2003-04. Merely, the DR mentioned that nobody has gone into that issue, therefore, the matter should be set aside. We are unable to appreciate this line of argument of the CIT-DR for the simple reason that it is the responsibility of the AO first of all to follow the jurisdictional decision of the Tribunal in assessee's own case for the AY 2003-04. The same was not followed and surprisingly, they have not even distinguished. They simply ignored stating that the said order is not accepted by the Revenue and the matter is pending before the Hon'ble High Court of Bombay. Considering the above, we are of the considered opinion that there is no case for sending the files to the Revenue. In fact it is the case of the assessee that the facts are identical vis-a-vis the facts of the assessment year 2003-04. In these circumstances, we are of the opinion that the decision comprised in para 41.2 is equally relevant for the year under consideration in respect of Ground No. 1. Accordingly, Ground No. 1 raised by the assessee is allowed."

4.6. After considering the arguments of the Assessing Officer given in the assessment order as well as in the subsequent reports and that of the appellant, including the documents and submissions available on record, it cannot be denied that the facts and circumstances of this case is similar to A.Y. 2006-07 and A.Y. 2003-04. The Assessing Officer has not distinguished the facts on those lines even during appeal. Therefore, the findings given by the Hon'ble ITAT has to be followed. Ground No. 1 of the appellant is accordingly allowed.”

2.8 Aggrieved with such order of CIT(A), the Revenue is in appeal before us.

3. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer & CIT(A) and the Paper Book filed on behalf of the assessee. We find following the order for A.Y. 2003-04 and 2006-07, the Tribunal in assessee's own case for A.Y. 2008-09 vide order dated 31-01-2014 has held as under :

> "2.2 Nothing contrary was brought to our knowledge on behalf of revenue. Facts being similar, so following the same reasoning, we are not inclined to concur with the finding of DRP. We are of the view that the assessee did not have any PE in India, much less a PE to which subject royalties and fees for technical services could be attributed. In terms of Indian-German DTAA, India does not have right to tax these receipts as business profit under Article 7. In the light of above finding that no revenue earned by the assessee could be said to be attributable to PE, even if one was to come to the conclusion that a PE existed, no taxability could arise under Article 7. The assessee has offered the royalties and fees for technical services for taxability in India under Article 12A and to that extent, admitted tax liability exists. This approach of the Assessing Officer was rejected by the CIT(A) in A.Y. 2006-07 for the reasons discussed above. Accordingly, the issue in ground No.1 is allowed as discussed above."

3.1 Since the Ld.CIT(A) while deciding the issue has followed the decision of the Tribunal in assessee's own case for A.Y. 2003-04 and 2006-07 and since similar view has been upheld by the Tribunal in A.Y. 2008-09, therefore, respectfully following the consistent decision of the Tribunal in assessee's own case and in absence of any contrary material brought to our notice, the order of the Ld.CIT(A) on these issues is upheld and the grounds raised by the Revenue are dismissed.

4. Grounds of appeal No.3 by the Revenue reads as under :

> "3) On the facts and in the circumstances of the case, the CIT (A)-l, Pune erred in law by holding that even if a PE exists, but if the receipts

> sourced from India are not attributable to the PE, then the case of the assessee would still fall under Article 12(2) and exclusion clause provided in Article 12(5) would not be invoked thereby not triggering Article 7 of the treaty for the rate purposes."

4.1 Facts of the case in brief, are that the Assessing Officer, during the course of assessment proceedings observed that as per 12(5) of the DTAA between India and Germany, if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carried on business on the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment, the provision by which royalty is taxed at 10% would not apply. In such case, the provisions of Article 7 shall apply.

4.2 He noted that Article 7(1) of DTAA between India and Germany stipulates that :

> "The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment".

4.3 He observed that during the year under consideration, the assessee is in the receipt of the royalty income which is attributable to PE in India. Accordingly, the same income has to be taxed u/s.115A r.w.s. 44AD of the Act at 20% without allowing any deduction in respect of any expenditure or allowance under any of the sections from Sections 28 to 44C. He accordingly taxed the same @20% without allowing any expenditure is allowance under any of the provisions of section 28 to 44C.

4.4 In appeal the Ld.CIT(A) decided the issue in favour of the assessee by observing as under :

> "5.1 In respect of the above ground, my attention was further drawn to the finding of CIT(A)-II, Nasik given in A.Y. 2003-04 wherein it was shown that the Ld. CIT(A) has held in para 24, 25 and 29 that all activities relating to the income streams are carried on outside India and thus cannot be attributed to the alleged Indian PE. The finding given in para 29 is quoted below for ready reference :
>
> "Thus, there is no basis on the A.O's conclusion that royalties, fee for the technical services including managerial; consultancy services in relation to the outside activities of the assessee company are effectively connected with the PE of the assessee and such activities are being managed and controlled by the assessee through the employees of the subsidiary companies. It is also wrong on the part of the A.O. to conclude that the assessee has a place of management i.e. subsidiary companies in India which are making payments to the assessee company. The basis on which A.O. came to the conclusion i.e. various emails, correspondence were already discussed elaborately and proved to be wrong. Therefore, the income of the assessee cannot be charged to tax as per Article 7 of DTAA and u/s. 44 AD. r.w.s. 115A of the I.T. Act."
>
> 5.2. My attention was further drawn in respect of the above ground to the finding given by the Hon'ble ITAT on the above issue in A.Y. 2003-04 on the appeal filed by the Department and the same is also quoted below for ready reference :
>
> "Conclusion on the second issue i.e., taxability @ 20 per cent in terms of Section 44D r.w.s. 115A in case PE is found to be in existence:
>
> 47. In our considered view, in terms of the indo German tax treaty provisions, it will have to be demonstrated that such royalties and fees for technical services have a live economic nexus with the PE and only then exclusion clause under Article 12(5) as a/so taxability under Articles 7(1) and 7(2), will come into play. It is only after these royalties and fees for technical services are so included in the business profits attributable to the PE that the provisions of Sections 44D and 115A can be invoked. Therefore, even if we are to hold that the taxpayer had a PE in India, unless there is a categorical finding that entire receipts were attributable to that PE, entire business receipts of the taxpayer sourced from India would not have been taxable in India under Article 7. The provisions of Section 44D and Section 115A do not, therefore, come into play only because there is a PE in India.

Taxability under the domestic law:

48. The next thing to be examined is taxability of 'royalties and fees for technical services' earned by the assessee company in terms of the provisions of the Indian Income Tax Act, 1961.

49. There is no dispute on the basic facts. The amounts received by the assessee company on this account meet the definition of 'royalties' and of fees for technical services' under Section 44D which, in turn, refers to Explanation. 2 to Section 9(1)(vi) and to Section 9(1)(vii) respectively. Accordingly, the limitation on deductions, as set out in Section 44D, does apply on the facts of the case, and entire amount is to be taxable on gross basis. However, in view of the provisions of Section 115A, the rate of tax on such income will indeed be 20%.

50. In view of the above discussions, the taxability of amounts received by the assessee company on account of 'royalties' and 'fees for technical services', on the facts of this case and under the Indian Income Tax Act, will be @ 20 % on gross basis, That aspect of the matter is, however, academic since we have already held that, on the facts of this case, source country does not have the right to tax income in question, except under Article 12(2) of the tax treaty and at a rate not exceeding 10 per cent. The assessee has already accepted tax liability to that extent, and there is no dispute so far as taxability under Article 12(2) is concerned."

5.3. In this context, the Authorised Representative also invited my intention to para 10 of the Tribunal's order passed in appellant's own case for A.Y. 2006-07 wherein it was concluded that the income earned by the appellant cannot be attributed to its alleged PE. The relevant para of the said order is also reproduced for ready reference :

"11. Considering the above, the issue raised by the assessee in Ground No 2 is covered in favour of the assessee and the taxation on gross basis at higher rate of 20% under section 115A read with 44D of the Act are unwarranted and taxation is ought to be at 10% on gross basis under Article 12(2) of the Tax Treaty as offered in the return of income. Accordingly, Ground No. 2 is allowed."

5.4. In view of the discussions made above and considering the totality of the facts and circumstances available on record in respect of the above ground, I have to hold that the above ground is covered in favour of the appellant by the order of the ITAT given in A.Y. 2006-07 and A.Y. 2003-04. Therefore, Ground No.3 is allowed".

4.5 Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

5. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We find the Ld.CIT(A) has

decided the issue following the decision of the Tribunal in assessee's own case for A.Y. 2003-04 and 2006-07. We find the above decision of the Tribunal has been followed by the Tribunal in assessee's own case for A.Y. 2008-09 vide ITA No.2535/PN/2012 order dated 31-01-2014 wherein the Tribunal has held as under :

> "3. Next issue is with regard to non attribution of income deemed to accrue or arises in India. In this regard again the learned Authorized Representative has submitted that this issue is also covered in favour of the assessee (relating to non-attribution of income), the Tribunal has decided the issue vide para 10 of its order in assessee's own case for A.Y. 2006-07, wherein the issue has been decided in the similar facts and circumstances for A.Y. 2003-04, by observing as under:
>
> "Conclusion on the second issue i.e. taxability @ 20 per cent in terms s. 44DS r/w s.115A in case PE is found to be in existence:
>
> 47. In our considered view, in terms of Indo German tax treaty provisions, it will have to be demonstrated that such royalties and fees for technical services ha e a live economic nexus with the PE and only then exclusion clause under art. 12(5) as also taxability under arts. 7(1) and 7(2), will come into play. It is only after these royalties and fees for technical services are so included in the business profits attributable to the PE that the provisions of sec. 44D and USA can be invoked. Therefore, even if we are to hold that the taxpayer had a PE in India, unless there is a categorical finding that entire receipts were attributable to that PE, entire business receipts of the taxpayer sourced from India would not have been taxable in India under art. 7. The provisions of s. 44D and s.115A do not, therefore, come into play only because there is a PE in India. Taxability under the domestic law:
>
> 48. The next thing to be examined is taxability of royalties and fees for technical services' earned by the assessee company in terms of the provisions of the Indian IT Act,1961.
>
> 49. There is no dispute on the basic facts. The amounts received by the assessee company on this account meet the definition of 'royalties' and of fees for technical services' under S.44D which, in turn, refers to Expln.2 to s. 9(1)(vi) respectively. Accordingly, the limitation on deductions, as set out in 5.'MD, does apply on the facts of the case, and entire amount is to be taxable on gross basis. However, in view of the provisions of s.115A, the rate of tax on such income will indeed be 20 percent.
>
> 50. In view of the above discussions, the taxability of amounts received by the assessee company on account of 'royalties' and 'fees for technical services', on the facts of this case and under the Indian IT Act, will be @ 20 percent on gross basis, That aspect of the matter is, however, academic since we have already held that, on the facts of this case, source country does not have the right to tax income in question, except under art. 12(2) of the tax treaty and at a rate not exceeding 10 per cent. The

> assessee has already accepted tax liability to that extent, and there is no dispute so far as taxability under art. 12(2) is concerned."
>
> 11. Considering the above, the issue raised by the assessee in Ground No 2 is covered in favour of the assessee and the taxation on gross basis at higher rate of 20% 'under section 115A read with 44D of the Act are unwarranted-and taxation is ought to be at 10% on gross basis under Article 12(2) of the Tax Treaty as offered in the return of income. Accordingly, Ground No. 2 is allowed."
>
> 3.1 Nothing contrary was brought to our knowledge on behalf of revenue. Facts being similar, so following the same reasoning, we are not inclined to concur with the finding of DRP and the same is set aside. According to us, taxation at gross basis at higher rate of 20% u/s.115A r.w.s. 44D of Act are unwarranted and taxation has to be at 10% on gross basis under article 12(2) of the Tax Treaty as offered in the return of income. Accordingly, this ground of assessee is allowed."

5.1 Nothing contrary was brought to our notice against the order of the Tribunal in assessee's own case for A.Y. 2003-04, 2006-07 and 2008-09. Since the order of the CIT(A) is based on the decision of the Tribunal in assessee's own case for A.Y. 2003-04, 2006-07 and since the Tribunal has taken similar view in A.Y. 2008-09 in assessee's own case, therefore, in absence of any contrary material brought to our notice we find no infirmity in the order of the CIT(A). Accordingly, we uphold the same. Ground of appeal No.3 by the Revenue is accordingly dismissed.

<u>ITA No.787, 788, 789 and 790/PN/2012 (A.Y.2001-02, 2003-04, 2004-05 & 2005-06) :</u>

6. After hearing both the side, we find the grounds by the Revenue are identical to grounds of appeal in ITA No.786/PN/2012. We have already decided the issues and the grounds raised by the Revenue have been dismissed. Following the same ratio, the grounds raised by the Revenue in the above appeals are dismissed.

CO Nos. 25 to 28/PN/2013 (By Assessee) (A.Y. 2000-01, 2001-02, 2002-03 & 2005-06) :

7. At the time of hearing the Ld. Counsel for the assessee submitted that grounds of appeal No. 1.1 and 1.3 are consequential in nature. Since the order of Ld.CIT(A) has been upheld, therefore, these grounds becomes academic in nature. Accordingly, these are dismissed.

7.1 Ground of cross appeal No.1.2 is regarding as to whether the interest u/s.234B is applicable or not.

7.2 Since the appeals filed by the Revenue are dismissed grounds of appeal No. 1.2 of the cross objections as to whether interest u/s.234B is applicable for residents become academic in nature and therefore the same is not being adjudicated.

8. In the result, the appeal filed by the Revenue and all the cross objections filed by the assessee for the above assessment years are dismissed.

ITA No.812/PN/2012 (By Assessee) (A.Y. 2004-05 :

9. The first issue raised by the assessee in the ground of appeal No.1 relates to taxability of payment of Rs.24,38,72,088 received by the assessee from EIPL on account of project "MOVE".

9.1 Facts of the case, in brief are that the assessee claimed that the receipt from EIPL on account of project "MOVE" is towards reimbursement of expenses and therefore, is not an income even under Article 11 and 12 of the DTAA. However, WOSs have deducted withholding tax @ 10% on the above receipt. It was submitted that the assessee having been the principal company of the Epcos group, on noting growing worldwide demand on information management, decided to introduce the SAP R/3 + APO software package on worldwide basis for all the companies of the Group. This was for improving the business processes throughout the Epcos Group. In order to implement this objective, EPCOS established a project group called 'MOVE' (Moving the Organization to a Visionary Enterprise) wherein EPCOS Entities were pool members/participants. The Project involved developing a global template through pilot phase and then implementing the system (roll out) in all the companies within the group. Implementation of such system entailed substantial costs to be incurred by each member of the Pool consisting of cost of employees dedicated for the project, software and license cost, costs of consultants engaged in customizing the system, data migration, training etc. As per the assessee under this project agreement, the Pool Members incurred costs for developing global template which was then to be shared between all members through receivables / payables. The assessee also claimed to have contributed its own costs to the Pool for participation along with various other members of the Group. The assessee claimed to have acted as the Pool Leader for the purpose of implementing the arrangement and received contributions from the various participants. Accordingly, the assessee stated that the receipts from project "MOVE" are not in the nature of services rendered to the Indian companies for which tax is to be paid in India by the assessee company.

9.2 However, the AO was not satisfied with the arguments advanced by the assessee. The AO noted that this fact was noticed on perusal of assessee's return of income wherein TDS certificates for the taxes withhold by the Indian WOS was enclosed. The Assessing Officer came to the conclusion that the agreement produced by the assessee itself is not sufficient to hold that the receipt was only reimbursement and not for I T services provided to the Indian subsidiaries. Rejecting the various explanations given by the assessee, the Assessing Officer concluded that the receipts on account of project "MOVE" are for services rendered by the assessee to its Indian subsidiaries, for which even the Indian subsidiaries deducted the tax at source treating the said payment as taxable in India being the income-of the assessee as per section 9(1) (vii)(b) of the IT. Act. The Assessing Officer thereafter proceeded to hold that the above receipt is taxable under Article 7 of DTAA.

9.3 Before the CIT(A) it was submitted that the assessee has filed the agreement relating to "MOVE" as well as a note and certain other documents in support of the claim that the receipt is only a reimbursement of expenses without any mark up and therefore, cannot be subjected to any tax in India. It was submitted that under the I.T. Act, a payment to a nonresident becomes taxable in India only when (i) the payment in question is "income"; and (ii) such "income" is liable to Indian tax. In the instant case, the proposed payments were claimed to be for recovering project costs as Pool Leader under the arrangement put in place without charging any mark-up thereon. Therefore, the payments under consideration do not constitute income in the hands of assessee, and hence the same is not taxable in India. The assessee also relied on the following decisions :

1. CIT v. Dunlop Rubber Co. Ltd, [1983] 142 ITR 493 (Cal).
2. Rolls Royce India Ltd. v. ITO [1988] 25 ITD 137 (Del) (TM),
3. CIT v. Industrial Engineering Projects Pvt. Ltd [1993] 202 ITR 1014 (Del).
4. Decta v. CIT [1999] 237 ITR 190 (AAR).
5. Raymond Ltd. v. DCIT (2003) 86 ITD 791 (Mum)
6. ABB Limited (2010)322 ITR 564 (AAR).

9.4. Based on the arguments advanced by the assessee the Ld.CIT(A) dismissed the grounds raised before him by observing as under :

> "6.2 I have carefully considered the facts of the case and the law as are apparent on this ground. From the details submitted including the agreement it is not possible to hold that the impugned payments are of the nature of reimbursement only. The agreements are between the appellant and its WOSs spread all over the world, all of which are undisputedly under the active control of the appellant. There is no dispute to the fact also that the appellant has other agreements in existence for providing services and know-how etc. for which payments and royalties have been received subject to withholding tax. Now the only question arises is, whether the impugned receipt is of the nature of technical service or not. Under technical consideration of the DTAA and the IT provisions available in Income tax Act, the Indian subsidiaries have been held not to be a PE of the appellant company by the higher Courts despite the clear-cut demonstration by the Assessing Officers that the appellant company holds huge and constant control on day to day matters of business also including the recovery of outstandings in the market but the aforesaid finding regarding the active control has remained established. In such view of the matter, only on the strength of documents created by the related interested parties, it cannot be said that the appellant has discharged its onus of claim made that the receipts are of the nature of reimbursement having no elements of income. In fact, from the perusal of the agreement, it is apparent that the expenditure is for enhancing the operations of the group as a whole with emphasis on the appellant company which is the apex company. Therefore, it is difficult to hold that it is not for the technical services provided by the appellant company to its all WOSs. For providing this service the appellant might have taken services from a third party and would have paid the same also but in that case even the said expenditure, if so held would become ineligible as expenditure in the hands of the WOSs. Since that aspect is not before the undersigned, the same is ignored and the receipts for project MOVE is held to be of the

> nature of technical services on which tax @ 10% is required to be paid under Article 11 and 12 of DTAA. This further gets strength from the action of the WOSs, falling in the same management to withhold tax u/s 195 of the IT. Act. The case laws relied upon by the appellant were found to be not relevant to the facts of this case. In all these cases, relied upon by the appellant there was no dispute to the fact that the receipt was of the nature of reimbursement, in view of the above Ground No. 2 is dismissed."

9.5 Aggrieved with such order of the CIT(A) the assessee is in appeal before us.

10. We have heard the rival submissions of the parties. The Ld. Counsel argues that the assessee is a Multinational Company having the subsidiaries across the globe. The assessee has central uniform policy for rendering the services to its subsidiaries and the cost incurred on the project is recovered uniformly with small mark up at 1% to 3%. He submits that due to growing worldwide demands on Information Management, the assessee company decided to introduce the SAP-R/3+APO Software package on company wise basis. He submits that the said software is to prove a uniform platform for planning, managing and monitoring the business processes throughout the assessee group companies. The assessee has taken a project for its group "MOVE" (Moving the organisation of Visionary Enterprise). The said project was taken with an aim to analyse existing processes, to identify potential for optimisation and re-designing the processed with the help of SAP-R/3+APO I.T. Infrastructure. He submitted that it is a pool arrangement with assessee as Pool leader and other group companies and subsidies as a pool members under the "MOVE" project.

10.1 He submitted that as per the agreement entered into between the assessee company as a pool leader and its subsidies/group companies as Pool members the project cost is to be allocated to the members to the agreement and the members to the agreement are to reimburse the cost incurred by the assessee company. As per the agreement clause 6(2) it is provided that the project cost incurred by the pool leader shall be reconciled with the assessee company as a pool leader on monthly basis. He submits that the both the authorities below have not at all examined the agreement between the assessee company and its subsidiary group companies as a pool members and has arrived on an erroneous conclusion. He submits that reimbursement of expenditure cannot be treated as income earned on the project “MOVE” and cannot be treated as income in the hands of the assessee at entirety. Per contra the Ld. Departmental Representative supported the order of the authorities below.

10.2 The assessee has filed the compilation in which the copy of the agreement in respect of “MOVE” project is placed at pages 38 to 55. The argument of the Ld. Counsel is based on the terms of the Agreement between the assessee company as a group leader and group companies/subsidiaries based at France, Spain, Portugal, Hungary, Czek Republic, Brazil, India etc. So far as India is concerned, it is the claim of the assessee that assessee has reimbursed the cost of the “MOVE” project from two of its subsidiaries, i.e. International Ferrides Ltd. and EPCOS India Ltd..

10.3 We have perused the terms of the agreement. We have also perused the reasons given by both the authorities for rejecting the claim of the assessee. The Ld.CIT(A) has not gone into the details of the terms of the agreement. It is true that some mark up is there which has described as administrative surcharge to the extent of 3%. Prima-facie, it appears that the project "MOVE" undertaken by the assessee company is not as a business activity but to support the group companies worldwide to improve their efficiency. In our opinion, this issue needs fresh adjudication. We, therefore, consider it fit to restore the issue to the file of the Ld.CIT(A) for Denovo adjudication with direction that he should examine the contention of the assessee in the light of the agreement between the assessee as a pool leader and its other group companies as Pool members. Needless to say he should give an opportunity of being heard to the assessee and also consider all the contentions raised by the assessee. Accordingly, Ground of appeal No.1.2 to 1.3 are allowed for statistical purposes.

11. The next issue raised by the assessee in the grounds relate to interest charged u/s.234B of the Act.

12. We have heard the parties. The Ld. Counsel submits that this issue is only consequential. He further submits that as the payment received by the assessee was subject to the TDS provisions there was no liability to advance tax in India and hence the interest charged u/s.234B is totally erroneous. He submits that the issue may also be sent back to the Ld.CIT(A). We accordingly with the consent of both the parties

remit the issue of charging of interest u/s.234B to the file of the Ld.CIT(A) for fresh adjudication. Accordingly, Ground Nos. 2.1 to 2.3 are allowed for statistical purposes.

13. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Pronounced in the Open Court on 26-03-2014.

Sd/-	Sd/-
(R.S.PADVEKAR)	**(R.K. PANDA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

satish
Pune, dated 26th March, 2014

Copy of the order is forwarded to:

1. The Assessee
2. The Department
3. The CIT(A)-I, Pune
4. The CIT-I, Pune
5. The DR "A" Bench, Pune.
6. Guard File

By Order

// True Copy //

Senior Private Secretary,
Income Tax Appellate Tribunal, Pune