IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)
And Saktijit Dey (Judicial Member)

ITA No. 743/Mum/2015
Assessment year: 2011-12

Audi AG .... **Appellant**
C/o SRBC & Associates LLP,
14th Floor, The Ruby, 29
Senapati Bapat Marg, Dadar(W),
Mumbai 400028
[PAN:AAHCA3173A]

Vs

Deputy Director of Income Tax (IT) ....**Respondent**
Range 1(1)(2),
Mumbai

Appearances by
Rajan Vora and Sapan Choksi *for the appellant*
V. Sreekar *for the respondent*

Date of concluding the hearing: September 18th, 2019
Date of pronouncement : December 16th , 2019

ORDER

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of DRP's order dated 27.10.2014 in the matter of assessment under section 143(3)(iii) r.w.s. 144C(13) of the Income Tax Act 1961 for the assessment year 2011-12.

2. Grievances raised in the appeal are as follows:

1. erred in holding that Volkswagen Group Sales India Pvt. Ltd ('VGSIPL'} constitutes a Permanent Establishment ('PE') in India and assessing the total income at Rs 8,03,67,812.

Fixed Place PE in India

2. erred in holding that VGSIPL constitutes a fixed place PE of the Appellant in India under Article 5(1) of the India -Germany treaty (Treaty1);
The learned AO/ DRP failed to appreciate that

Appellant does not have any premises for carrying any business at its disposal in India and hence it does not have any Fixed Place PE in India under Article 5(1) of the Treaty; -

VGSIPL should not be the Appellant's PE merely due to the fact that it is the Appellant's group company.
Agency PE in India

3. erred in holding that VGSIPL constitutes an Agency PE of the Appellant in India under Article 5(5) of the Treaty;

The learned AO/ DRP failed to appreciate that
Transaction between the Appellant and VGSIPL are on principal to principal basis and there is no agency relationship;

VGSIPL should not be the Appellant's PE merely due to the fact that it is the Appellant's group company;

VGSIPL is an independent agent and hence does not lead to a Dependent Agent PE of the Appellant in India;

without prejudice to the contention that VGSIPL is an agent of independent status, failed to appreciate that VGSIPL does not exercise authority to conclude contracts on behalf of the Appellant in India, maintain any stock of the merchandise of the Appellant, from which it makes regular deliveries on behalf of the Appellant and secure orders wholly or almost wholly for the Appellant in India.

Business connection in India

4. erred in holding that VGSIPL constitutes a business connection of the Appellant in India under Section 9 of the Act.

5. without prejudice to ground no 4, erred in holding that the income from sale of cars and accessories, sale of sales promotional items, services and sole distribution fees received from VGSIPL in India, accrues or arises to the Appellant through business connection in India.

The learned AO/ DRP failed to appreciate that all the related activities for sale of cars and accessories, sale of promotional items and services are carried out outside India and hence, no portion of the income of the Appellant from sale of cars, and sales promotional items to VGSIPL in India is taxable in India.

Attribution of 35% of income in India and adopting operating profit ratio @ 10.30 %

6. without prejudice to the above, erred in attributing income in India for activities of export of cars, accessories and promotional items to India, as operations in connection with such exports viz, manufacture and transfer of property of the goods supplied, are completed outside India.

7. erred in estimating the worldwide profitability rate of AUDI AG at 10.30 percent and attributing 35 percent of the profits from the sale of cars and accessories, sale of sales promotional items, etc in India as attributable to activities carried out by the PE in India.

8. without prejudice to the above, erred in attributing profits to the PE without recording the reason for the same or bring any evidence on record to justify the same.

Deduction for warranty, marketing, advertising and promotional expenses reimbursed by the Appellant (Without prejudice to all above objections)

9. without prejudice to the above, the learned AO/ DRP has erred in not allowing deduction of warranty, advertising, marketing and promotional expenses of Rs 28,05,40,999 incurred by VGSIPL and reimbursed by the

Appellant relating to brand building campaigns/ warranty expenses while computing income from sale of cars as income taxable in India.

10. without prejudice to the above, erred in not considering the alternative computation mechanism of attribution of profits to PE for allowing deduction of India specific expenditure of Rs 28,05,40,999.
Taxability of sole distribution fees in India

11. erred in considering sole distribution fees of Rs 5,01,86,605 taxable in India, in the absence of PE and business connection in India.

Levy of Interest under section 234B of the Act

12. erred in levying interest of Rs 1,21,40,837 under Section 234B of the Act.

The learned AO/ DRP failed to failed to appreciate that no interest under Section 234B of the Act can be levied being Appellant is a non resident assesses and its income is subject to deduction of tax at source.
Non-receipt of refund of Rs 55,01,130

13. erred in adjusting the amount of refund of Rs 55,01,130 while computing tax demand payable which was never received by the Appellant.

Levy of Interest under section 234D of the Act

14. erred in levying interest of Rs. 6,05,124 under section 234D of the Act, as the amount of refund of Rs. 55,01,130 was never received by the Appellant.

3. Even though the issues in this appeal are admittedly covered by the decision of coordinate bench dated 3rd September 2019, in assessee's own cases for the assessment year 2009-10 and 2010-11, the matter was heard at length. We however see no reasons to take any view of the matter then the view taken by the coordinate bench in the aforesaid decision wherein the coordinate bench has inter alia observed as follows:-

13. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also gone through the other material consisting of various paper books and the various case laws relied by learned representative of the parties. We have also gone through the contents of the Importer agreement between the assessee and its AE. The assessee is tax resident of Germany and India had entered in tax treaty with Germany. And as per the provisions of section 90(2) the assessee is entitled to invoke the provision of Income Act or the India Germany DTAA, which is more beneficial to them. A non-resident entity will be liable to tax in India if the activities under taken by them constitute its business connection which constitute permanent establishment. The question is whether the non-resident has business connection in India from or through which income profit or gain can be said to be accrue or arise to them within the meaning of section 9 or Article 5 of India Germany tax treaty, has to be determined on the facts of each case.

14. During the assessment, the assessing officer on going through the Importer agreement (IA) in para 11 of the draft assessment order observed that:

- *VGSIPL is the exclusive distributors of Audi Product in India whose only source of income is from Audi sales,*
- *Business activities of VGSIPL are devoted wholly on behalf of assessee,*
- *Activities of the assessee and VGSIPL complement each other and VW Group sales is functioning as an extended arm and replacement of assessee in India,*
- *As per clause 1 of Importer agreement, the assessee and VW group sales are jointly establishing the sales targets,*
- *Most of the senior officials working with the VW group sales have all come from Audi Group abroad.*

15. On the basis of his above observation, the assessing officer took his view that activity of storage, marketing, soliciting with clients and potential customers, after sales services and support services, supply of spare parts and accessories, taking part in Auto Expo are done by VGSIPL on behalf of the assessee and are carried out from fixed place of business maintained in India, thus, the assessee has business connection in India and has a PE in India within the meaning of Article 5(5) of India Germany tax Treaty. Accordingly the assessing officer attributed 35% of the

total income of the assessee in India as attributable to Indian PE. The assessing officer worked out the taxable income by applying operating profit margin of 6.39% as per global audited account and computed taxable income of Rs. 3,11,43,567/-. The ld DRP conformed the action of the assessing officer it its direction dated 06.09.212 holding that that activity of storage, marketing, advertisement, promotion of product of the assessee, soliciting with clients and potential customers, after sales services and support services, supply of spare parts and accessories, taking part in Auto Expo are done by VGSIPL on behalf of the assessee and are carried out from fixed place of business maintained in India. Sales targets are meet jointly established by the assessee and VW group. VW Group sales has no independent authority to act on his own, but is bound by the terms and conditions of the assessee. The ld DRP also relied on the decision of Aramex International Logistic Pvt Ltd.(supra).

16.The foremost and primary controversy before us, whether VW group sales constitute assessee's PE in India or not. The assessee is tax resident of Germany. Article 5 of India Germany text treaty defined fixed place of PE. As per article 5 of Indo Germany text treaty, a fixed place arises when the foreign entity has a fixed place in India through which its business is wholly or partly carried on.

17.During the submission the learned AR of the assessee has pointed out that similar facts were considered by Mumbai Tribunal in case of Daimler AG (supra). In Daimler AG (supra) it has been held that the subsidiary of that company cannot be regarded as PE and with respect to carrying or business in India as a parts and completely knocked down (CKD) sales are made by the assessee to Daimler Chrysler India Ltd (DCIL) on principle to principle basis and on sale such parts /CKD become property of DCIL, which does not constitute sales outlet or warehouse of the assessee has, that assessee does not carry out any operation in India in respect of sales of part of CKD to DCIL and therefore cannot qualify to have a PE in India accordance with Article 5(1) and 5(2) of Indo German tax treaty. The learned AR of the assessee while arguing his case submitted before us the transaction between VW group sales and assessee is on principle to principle basis and the transaction is completed outside India and the title/delivery is made outside India. Therefore, profit on sales does not accrue or arise to assessee in India. For completeness

of this order the relevant part of the order is extracted below:
6. --------- the Tribunal had examined the issue in assessee's own case in A.Y. 2001-02. Both the parties agreed that the issue raised by the revenue in this appeal have already been considered and decided by the Tribunal in A.Y. 2001-02. On the issue of accrual of income on sale of CBU Cars in India the Tribunal in assessment year 2001-02 in ITA No. 9211/M/04 held as follows:

> *"11. After hearing both the sides, we find force in assessee's arguments. The Assessee merely sells the raw materials/CKD units to DCIL. It is DCIL which carries out further activity of assembling the same and selling the finished cars. There are no further activities carried out by Appellant in India in India in this connection. This transaction ends with the Appellant selling the raw materials/CKD. No income from such sale accrues or arises to the Assessee in India. In other words no part of such profits accrue from or can be attributed to any activities of the assessee or his agent in India. The Apex Court in the case of CIT v. Hyundai Industries Ltd. (29 1 ITR 482) has held that in the case of an agreement with a South Korean Company for fabrication and installation of Oil exploration platform, the PE attributable to installation and commissioning came into existence only after the supply of the equipment. Therefore, profits from supply of the platform did not accrue in India. Similarly in the case of Ishikawajima Harima Heavy Ind. Ltd v. DIT (288 ITR 408), the Apex court held that profit will not accrue in India in respect of offshore supply of equipment. (The subsequent amendment to sec 9(1)(i) will not affect the decision on profit arising from sale of equipment offshore.) Mere sale of raw materials/ components will not result in business connection and even if it does as per the terms and conditions of the contract between the Assessee and DCIL no income accrues to the Assessee on the basis of any activities carried out, on behalf of the Assessee in India. Therefore in our opinion DCIL does not constitute the Assessee's business connection in India and thus the Assessee's income from sale of raw material/CKD units to DCIL would not be liable to tax in India under the provisions of the Act. We therefore, concur with the decision of the CIT(A) on this issue and dismiss the ground No. 1(i) of the Revenue's appeal."*

7. The above observation in the context of sale of raw materials/CKD Units sale equally apply to sale of CBU Cars also. The finding of the CIT(A) is that on a perusal of the General Agency Agreement between the assessee and MBIL it was clear that delivery of goods took place outside India and the payment was also being made for purchase of goods outside India.
Therefore, there was no business activity carried out by the assessee regarding sale of CBU Cars directly to the customers in India. Thus the assessee does not have a business connection and that MBIL does not constitute a business connection with the assessee in India under section 9 of the Act, therefore, income in respect of sale of CBU Cars are not taxable in India.

8. We agree with the order of the CIT(A) on this aspect. On the issue whether MBIL constitute a PE of the assessee in India within the meaning of Article-5 (2) of the India - Germany DTAA the Tribunal in A.Y 2001-02 the CIT(A)held as follows:

"30. Now the activity of DCIL are twofold. (1) manufacture of cars using CKD packs and other components. (2) Act as communication exchange in respect of direct sale of CBUs by the Assessee directly to the clients in India. Even though the commission received by DCIL for helping the sale CBUs it is obvious that their main activity is that. Of manufacture of cars. Acting as communication conduit is not their main business. Further the dept has not established that DCIL actively canvasses orders for CBUs of Assessee or is actively engaged in negotiating and concluding contracts. If and when clients approach DCIL or their agents evidencing to buy CBUs from the Appellant DCIL passes on communication both sides. Negotiations of price, specifications etc were concluded by the Appellant. The sale to the customer was on principle to principle basis. The risk of diminishing in value or damages to the cars is to the account of customer's right from the port of shipment at the manufacturing end. The cars were cleared through customs in India for and on behalf of the ultimate customers. Thus, DCIL had no role to play from the sale or in any activity in promoting the sale to the Assessee directly to the customers in India. They are only collection of information and activities of preparatory or auxiliary in nature. The prices offered to the clients are as per the list price notified by the Assessee. DCIL has no authority to conclude any deal.

Thus the mere acting as post office between the Assessee and the client will not render DCIL as a dependent agent. DCIL cannot be considered as habitually procuring orders for the Assessee. In fact DCIL themselves are manufacturing and selling the cars aid procurement of orders for direct shipment of cars by the assessee would in fact he contrary to and against the interest of the DCIL in its manufacturing activity. DCIL by passing on communication from Assessee to the client and vice versa, are merely rendering a very insignificant auxiliary/preparatory service in the sale of CBUs by the Assessee to Indian clients. Therefore DCIL does not constitute a dependent agent of the Assessee. The prices offered to the Indian clients arc as per list price notified and so whether DCIL is involved or not the price charged to the customer would be the same. No profits can be attributed to the services of DCTL in India. In fact by engaging the services of DCIL, the profit of the Assessee is reduced to the extent of he commission paid to DCIL.

31. The following decisions cited by the assessee can be extracted for this purpose.
"The decision of the Hon'ble supreme Court in case of DIT v. Morgan Stanley & Co Inc 292 ITR 416 (refer page 555, 556 & 565 of Paper Book Volume II), wherein the Hon'ble Apex Court has observed that since the assessee did not conclude any contracts on behalf of Morgan Stanley & Co. Inc (MSCo), it did not have an agency PE in India. Similar view has also been taken by the Special Bench of Delhi Tribunal in case of Motorola Inc & Others v. DIT (2005) 95 ITD 269 (refer page nos. 580, 589 & 591 of Paper Book Volume II) and the Authority for Advance Rulings in case of TVVM Ltd. v. CIT (1999) 237 ITR 230 (Refer page 600 & 618 of Paper Book Volume II).

The Hon'ble Delhi Tribunal has in the case of Western Union Financial Services Inc (104 ITD 34) (Refer Pg 522 & 547 of Paper Book Volume II) observed that there is no evidence to show that the extent of their activities for the assessee, compared to oil their activities, is so large that it can be said that they are dependent on the assessee for their earnings or revenues. Accordingly, the agents are not economically dependent upon the assessee. Further, there is no authority with the agents to conclude contracts. The agents are merely performing their duties and not exercising any authority. Based on the above, the Hon'ble Tribunal concluded that there is no agency PE in India. In case of KnoWerX Education

(India) P Ltd. (301 ITR 207) (Refer Pg 619 & 632 of Paper Book Volume II), the Authority for Advance rulings has observed that since the applicant does not conclude any contract on behalf of the foreign company, does not maintain stock of goods/merchandise belonging to the foreign company and also carries on a variety of activities besides promoting examinations of the foreign company, the applicant enjoys an independent status. Accordingly, the applicant cannot be deemed to be a PE of the foreign company in India. Similarly, in case of Specialty Magazines P Ltd (274 ITR 310) (Refer Pg 633 & 644 of Paper Book Volume II), the AAR ruled that since 22% - 25% of the income of the applicant is derived from other clients, it cannot be said that its activities are carried out wholly or almost wholly for the foreign company. Thus the applicant, being an independent agent is not covered by the definition of PE in article 5 of the DTAA"

32. From the above it can be seen that merely acting for a non resident principal would not by itself render an agent to be considered as PE for the purpose of allocating profits taxable in the hands of the principal. There should be some definite activity of the PE to which profits can he attributed. Unless it is so established, merely calling a person as agent acting on behalf of foreign non-resident would not by itself render him to be considered as an agency PE and pro tanto part of the profits of the non-resident is liable to be taxed in India. We find that the Revenue has not established that DCIL had carried out any activity to which any profit can he attributed. DCIL was merely carrying out the work of a post office transferring communication from one to another. Therefore, we are not. convinced that the department had established that the activity of DCIL, even if it is to be considered as PE has resulted in any profits to the Assessee and in view of the specific provisions of the Article 7 of the Double Taxation Avoidance Agreement between Indian and Germany no part of the profit of the non-resident. Assessee can be attributed to the activity with DCIL and hence is not taxable in India.

33. As we have held that no profit accruing to the Assessee on sale of CBU cars directly to Indian customers can be attributed to the activities of OCIL, we are not deciding upon the correctness or otherwise of the percentage of profits, estimated by the CIT(A), as attributable to the activities of PE in India. Hence

Ground No.3 raised by the assessee is not decided as being infructuous."

9. As can be seen from the order of the Tribunal on identical facts, MBIL does not constitute PE of the assessee in India. Respectfully following the decision of the Tribunal referred to above we hold that income on sale of CBU Cars by the assessee in India does not give rise to a business connection in India and income on such sale is not taxable in India. We also hold that the MBIL does not constitute a PE of the assessee in India under Article 5(2) of the India- Germany DTAA. For the reasons given above both the grounds of appeal raised by the revenue are dismissed.

10. In the result, appeal by the revenue is dismissed."

18. The learned AR for the assessee also vehemently relied upon the decision of Hon'ble Supreme Court in case of Ishikawajima-Harima (supra), wherein it has been held that where the entire transaction has been completed offshore the profit on sale should not /could not be taxable in India.

19.The learned AR also relied upon the decision of Special Bench in case of Nokia Networks (supra) and submitted that the ratio of the said decision it is squarely applicable on the facts of case of assessee. the relevant part of decision in Nokia Network (supra) is extracted below;

56. We have heard the rival contentions made by the parties and also material placed on record. First of all, we find that the Hon'ble High Court in the context of LO has held that there is no material or evidence on the basis of which it can be said that LO can offer a business connection to assessee in India and it does not constitute PE of the assessee in India. The same reason ostensibly applies to NIPL also, as the terms and conditions of supply contract continues as spelled out in para 17 of the judgment remains the same. Further, the Hon'ble High Court in paragraph 13 has noted that income which has been earned by the assessee is a result of supply of software and hardware license under the supply agreement and if supply agreement is taken on standalone basis then such supplies under this agreement were made outside India. The properties and goods has passed on to the buyers under the supply contract outside India where the equipment was manufactured and for coming to this conclusion, the Hon'ble High Court

has referred and relied upon the judgment of Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd. (supra) that such agreement would not be taxable in India and no profit arising from supply of equipment outside India would be chargeable to tax in India.

In paragraph 15, the Hon'ble Court has further observed that no doubt the contract in question was signed in India but it may not be a relevant circumstance to determine the taxability of such an income and for this proposition they have referred the judgment of Hon'ble Andhra Pradesh High Court in the case of Skoda Export v. Addl. CIT [1983] 143 ITR 452/[1984] 17 Taxman 256. Finally in paragraph 17 as incorporated above, Hon'ble High Court has categorically said that the taxable event took place outside India with the passing of the property from seller to buyer and acceptance test is not the determinative of this factor and further referring to the judgment of Hon'ble Supreme Court in the case of Mahabir Commercial Co. Ltd. v. CIT [1972] 86 ITR 417 (SC), held that overall agreement does not result the income accruing in India and the execution of an overall agreement is promoted by purely commercial considerations as India Cellular Operator would be desirous of having a single entity that could liaise with. Thus, it was concluded that the place of negotiation, the place of signing of agreement or formula acceptance thereof or overall responsibility of the assessee are relevant circumstances. Since the transaction is relating to the sale of goods, the relevant factor and determinative factor would be as to where the property in good passes and in the present case, the finding is that the property has passed on high seas. In the present case, the goods were manufactured outside India and even the sale has taken place outside India and once this fact is established even in those cases where there is a one composite contract supply has to be segregated from installation and only then would question of apportionment arise having regard to expressed language of Section 9(1)(i) of the Act, which makes the income taxable in India to the extent it arises in India.

58. ----------- Thus, the Hon'ble High Court in Nortel's case has clearly concluded that equipments supplied overseas cannot be taxed under the Act and as per clause (a) of Explanation 1 to Section 9(1)(i) which postulates the principle of apportionment, the only such income that can be reasonably attributed to assessee in India could be chargeable to tax under the Act and therefore,

under the fact where there is off shore supply of equipments nothing can be held to be taxed in India in terms of Section 9(1). ---------- This judgment of Hon'ble Delhi High Court clearly clinches the issues in hand, both on the point of taxability u/s. 9(1)(i) and also in the context of PE. Thus, respectfully following the ratio laid down in aforesaid judgment of Hon'ble High Court in the case of assessee as well as in the case of Nortel, we hold that income of the assessee from off-shore supply of equipments in pursuance of supply contract cannot be brought to tax in India.

20. There is no dispute that the activities of manufacturing of Car is completed by assessee (Audi AG) outside India and constitute a separate and independent activity. The assessee claimed that Cars are sold to Volkswagen Group Sales for further sales in India and Volkswagon Group sales is not acting on behalf of Audi AG nor Audi AG is selling Car through Volkswagon Group Sales. The assessee also claimed that Cars are sold to Volkswagon Group Sales principle to principle basis and thereafter, Volkswagon Group Sales it on a principle to principle basis to the dealers. The sales of goods/Car are completed outside India than income arising from sales by no stretch of imagination can be said to be taxed in India. The assessing officer has not brought any material to counter the stand of the assessee that Cars are not sold to Volkswagon Group Sales on principle to principle basis and thereafter, Volkswagon Group Sales it on a principle to principle basis to the dealers.

21. We are also in agreement with the submissions of the ld. AR for the assessee that the facts of the decision in Daimler Chrysler AG (supra) are similar to some extent with the assessee in the present case. In the said case the assessee the assessee is also in the business of manufacturing and selling of premium vehicles worldwide (Mercedes) and tax resident of Germany. The assessee (Audi AG) is also tax resident of Germany. The comparative chart of the case in hand and that of Daimler Chrysler AG relied by ld AR for the assessee is refereed below:

Particulars	*Facts in case of Daimler Chrysler AG*	*Facts in case of Audi AG (assessee)*
Transaction with Indian entity	*Sales of raw material and parts and completely knocked down kit (parts /CKD) to DCIL*	*Export of CBU cars to VW group sales* *Exports of parts and accessories for assembling*

	Direct sales of CBU cars to Indian Customers, for which DCIL rendered certain services. Fee for technical services from DCIL Interest on delayed payments	of Audi brands cars to Skoda India. Export of sales promotional material to VW group sales. Fee for technical services. Interest on delayed payment
Whether any place in India	No officer or place of business in India	No officer or place of business in India
Term of delivery for sale of parts/ CKD/FBU	Delivery of parts CKD/CBU is outside India. Sale is concluded outside India. The risk of damage and loss is borne by DCIL Import duty is paid by DCIL. Custom clearance by DCIL The payment is received in foreign currency in bank outside India.	Delivery of parts/ CBU is outside India. Sale is concluded outside India. The risk of damage and loss is borne by VW group sales Import duty is paid by VW group sales. Custom clearance by VW group sales. The payment is received in foreign currency in bank outside India.
Authority to conclude contract	No authority to conclude contract	No authority to conclude contract
Activities carried out by DCIL/ VW Group sales	DCIL imports raw material /CKD units and carries out assembling and selling of finished cars. Providing liaising services in case of direct sales of CBU cars to Indian customers by DAG	VW group sales imports and sells to dealers on a principal to principal basis.
Term of sales	On principal to principal basis	On principal to principal basis
Any commission paid	Commission is paid to liaising services in case of direct sales	No commission is paid

22. We have noted that in case of Daimler AG (supra), despite the fact that the AE was performing more activities as narrated in the chart above, it was held that the associated entity not created either fixed place PE nor dependent agent. Further, the income arising on the sales of Car by Volkswagen Group Sales to dealers in India is income accruing or arising in India and is taxed separately in the hands of Volkswagen Group Sales. In our view merely acting for non-resident principal would itself render an agent to be considered

PE for the purpose of allocating profit. The assessee is not undertaking any definite activity to which profit can be attributed.

23.In view of the aforesaid discussions, we are of the V W Group sales is an independent and separate entity, which is engaged in selling of fully built up cars imported from the assessee, Volkswagen AG and Skoda India to dealers and distributors. Thus, VW Group cannot be regarded as a PE of assessee in India.

24.The case law relied by ld. DR for the revenue in Aramex Logistic Private Limited (supra) is not helpful to the revenue as the said case is based on the different set of facts. In the said case Aramex entered in to the contract with the customer outside India for delivery of parcel, where the delivery of the parcel located in India, further Aramex had an agreement with Aramex India for the delivery of the parcel to the location in India. The privity of contract was between Aramex and customer outside India. The completion of the contract for the delivery of the parcel will only be complete once the parcel is delivered to the location in India. Accordingly, the activity performed in India by Aramex India, viz; delivery of the parcel to the location in India is part of one transaction which cannot be independently performed. Thus, the decision cited by the ld. DR for the revenue is on different set of facts.

25.However, in the case of present assessee the care is manufactured by the Audi AG outside India and constitutes a separate and independent activity. As noted earlier the car is sold to VW Group for further sale in India and VW Group sale is not acting on behalf of Audi AG nor is Audi AG selling cars through VW Group sales. Moreover, the cars are sold on principle to principal basis. Hence, we are of the view that Assessing Officer was not justified in invoking section 9 of the Act and the Article 5 of Indo-Germany Tax Treaty for taking view that assessee has PE in India. In the result, Ground No.1 to 3 of appeal is allowed.

26.Ground No. 4 & 5 relates to attribution of income and estimation of Gross Profit. The assessee has raised these grounds of appeal in alternative. Considering the fact that we have allowed Ground No.1 to 3 of the appeal, therefore, the discussion on Ground No. 4 & 5 have become academic.

27.Ground No. 6 relates to deduction for marketing and promotional expenses. We have noted that this ground of appeal is also directly connected with the Ground No. 1 to 3 of the appeal, which we have allowed holding that the assessee has no PE in India and accordingly, the income earned by assessee is not taxable in India. Therefore, the adjudication of this ground of appeal is also become academic.

28.Ground No.7 relates to levy of interest under section 234B & 234C. Considering the fact that the assessee is a foreign company and tax resident of Germany. The entire income of the Audi AG is subject to tax deducted at source under section 195 of the Act. The assessee has no liability to pay advance tax and the fact that we have already hold that income earned by assessee is not taxable in India, we direct the Assessing Officer to recompute the tax/interest by following the decision of the jurisdictional High Court in case of NGC Network Asia LLC (313 ITR 187).

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

ITA No. 1781/Mum/2014 by assessee

30.The assessee has raised the following grounds of appeal:
(a) Ground No. 1 to 12 relates to Fixed Place PE/Agency PE in India.
(b) Ground No. 13 to 16 relates to attribution of income in India.
(c) Ground No. 17 to 18 relates to levy of interest under section 234B.
(d) Ground No. 19 to 21 relates to levy of interest under section 234C.

31.We have noted that the assessee raised the identical grounds of appeal as raised in appeal for A.Y. 2010-11, which we have allowed. Therefore, considering the fact that the issues raised in the year under consideration are based on similar set of facts, therefore, the appeal for the year under consideration is also allowed with similar directions.

4. Learned representative has also fairly agreed that the issues raised on this appeal are squarely covered by the aforesaid decision. We see no reasons to take in other view of

the matter then the view so taken by the coordinate bench. Respectfully following the same we uphold the plea of the assessee and direct the Assessing Officer to give relief as prayed for. The Tribunal observations in the assessment year 2009-10 and 2010-11 will apply mutatis mutandis on this year as well.

5. In the result, the appeal is allowed, in the terms indicated above. Pronounced in the open court today on the 16th day of December, 2019

Sd/-	Sd/-
Saktijit Dey	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 16th of December, 2019

Nishant Verma Sr.PS

Copies to: (1) The appellant (2) The respondent
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai