

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &  
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.1507/Mum/2021  
(A.Y.2017-18)**

GEBR PFEIFFER SE Barbarossastr 50-54, Kaiserlautern, Germany 676550	Vs.	ACIT, Circle 2(3)(2) 1711, 17 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai - 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAECG9980A		
Appellant	..	Respondent

**ITA No.54/Mum/2022  
(A.Y.2017-18)**

GEBR PFEIFFER SE Barbarossastr 50-54, Kaiserlautern, Germany 676550	Vs.	CIT(DRP-1) Income Tax Department Mumbai -3
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAECG9980A		
Appellant	..	Respondent

Appellant by :	Salil Aggarwal & Anil Makhija
Respondent by :	Soumendu Kumar Dash

Date of Hearing	02.02.2023
Date of Pronouncement	20.04.2023

आदेश / O R D E R

**Per Amarjit Singh (AM):**

These two appeals filed by the assessee are directed against different directions of the DRP and orders of the Assessing Officers. Since common issue on identical facts are involved in these two appeals

filed by the assessee, therefore, these appeals are adjudicated together by taking ITA No. 1507/Mum/2021 as lead case and its finding will be applied to ITA No. 54/Mum/2022 mutatis mutandis.

### **ITA No. 1507/Mum/2021**

- “1. *That the Learned Assessing Officer/DRP has grossly erred both on facts and in law in passing the impugned order without appreciating the true facts and circumstances of the case of the Appellant.*
2. *That the Learned Assessing Officer/DRP has grossly erred both on facts and in law in the interpretation of Article 5 and Article 7 of the DTAA between India and Germany while passing the impugned order.*
3. *That the Learned Assessing Officer/DRP has grossly erred both on facts and in law in considering M/s GEBR Pfeiffer India Private Limited (GPI) as Permanent Establishment (PE) of the Appellant without appreciating the fact that "GPI" is merely a subsidiary company of the Appellant and PE is not constituted by merely having a subsidiary as per Article 5 of the DTAA between India and Germany;*
4. *That the Learned Assessing Officer/DRP has grossly erred both on facts and in law in considering "GPI" as PE of the Appellant without appreciating the fact that "GPI" is an independent entity and has no contribution or attribution to the profits of Appellant in India or elsewhere;*
5. *That the Learned Assessing Officer/DRP has grossly erred both on facts and in law in considering that the Appellant maintains a fixed place of business at the premises of "GPI" from where significant core activities of the Appellant are being carried out which is without any basis and purely based upon the assumption and surmises;*
6. *That the Assessing Officer/DRI has grossly erred in considering that the Appellant has business connection in India through its AE namely "GPI" which helps in business development to the Appellant Company without any contrary evidence or issuance of any show cause before coming to such a conclusion:*
7. *That the Assessing Officer/DRP has grossly erred both on facts and in law in considering that "GPI is working as agent to facilitate Appellant's business in India without appreciating the fact that the Indian Subsidiary of the Appellant is not a Dependent Agent/Dependent Permanent Establishment of the Appellant and could not be treated as a Permanent Establishment (PE) of the Appellant. Further the observation made in the impugned order (Page 15) are totally incorrect and based on surmises,*
8. *That the Assessing Officer has grossly erred both on facts and in law in the interpretation of various judicial decisions of the courts and the reports of OECD in the impugned assessment order passed and in applying the same to the facts and circumstances of the case of the Appellant company.*

9. *That the Assessing Officer/DRP has grossly erred both on facts and in law in appreciating that the Appellant company satisfies the conditions of a fixed place PE under Article 5(1) of the Treaty without any basis and any contrary evidence;*
10. *That the Learned Assessing Officer/DRP has grossly erred in not appreciating the fact that the Appellant has Gross revenue from Business of Rs.1,31,81,590/ in India inspite of the documentary evidences submitted by the Appellant. The Learned Assessing Officer/DRP has grossly erred in holding that the gross revenue declared by the Appellant in the Return of Income is the net profit of the business of the Appellant from India which is factually incorrect.*
11. *That the Learned Assessing Officer/DRP has grossly erred in attributing 100% of the gross revenue of the Appellant to the alleged PE by erroneously considering gross revenue from Business as the net profit of the Appellant from India, which is without any basis and based on assumptions without any contrary evidence or issuance of any show cause before coming to such a conclusion;*
12. *That the Learned Assessing Officer/DRP has grossly erred in not appreciating the fact that the Appellant has not claimed any expenses in the Return of Income in India hence the Gross Revenue declared in the Return of Income is reflected as the net profit of the Appellant under the head profit and gains from business or profession in the computation of income. The Learned Assessing Officer/DRP has failed to understand that computation of income only reflects the Profit before tax and not the gross Revenue of the Appellant.*
13. *That without prejudice to above, the appellant has filed an application for rectification of mistake against the Directions of the DRP issued u/s 144C(5) of the Income Tax Act, 1961 read with section 154 of the Income Tax Act, 1961 with respect to considering the Gross Revenue declared in the Return of Income as the net profit of the Appellant in India, which is pending adjudication.*
14. *That the Learned Assessing Officer/DRP has grossly failed in applying the rule of consistency without appreciating the facts that in the earlier assessment years 25% of the gross revenue declared by the Appellant in the return of income was attributed to the PE and 10% of the revenue attributed was estimates as attributed profit taxable in India as compared to 100% of the gross revenue of the Appellant has been considered as the profit of the appellant and attributed the same to the alleged PE in the year under consideration which is arbitrary, extraneous and without any basis.*
15. *That the Assessing Officer/DRP has grossly erred in rejecting the claim of tax credit which is in fact the relief claimed by the appellant under the DTAA between India and German without appreciating the true facts and circumstances of the Appellant company;*
16. *That the learned Assessing Officer has grossly erred in levying of interest under section 234A, 234B, 234C & 234D which in any case could not been charged;*

17. *That the learned Assessing Officer has grossly erred in initiating penalty proceedings under section 270A read with Section 274 of the Income Tax Act;*

*That the above grounds of Appeal are independent and without prejudice to each other. That the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.”*

2. Fact in brief is that the assessee is a tax resident of Germany having its office at Barbarossastr 50-54, Kaiserslautern, 676550 Germany. The assessee has filed return of income for the year under consideration on 17.11.2017 declaring total income of Rs.2,97,33,239/-. The assessee company was into the business of providing design and engineering services and supply of equipment relating to the setting up of cement & allied industries. The case of the assessee was selected for scrutiny and notice u/s 143(2) of the Act was issued on 13.08.2018. During the year under consideration the assessee received receipt on account of the supervision, installation and commissioning of equipment. A part of these income Rs.1,65,51,649/- assessee has claimed to be in the nature of royalty/fee for technical services (FTS) on gross basis and offered the income for taxation as per provisions of Article 12 of the India-Germany DTAA. The remaining income received as supervision charges was declared as business income chargeable to tax on gross basis. In the return of income filed the assessee has offered Rs.1,31,81,590/- as income under the head profit and gains from business or profession chargeable to tax @ 40% on gross basis and Rs.1,65,51,649/- as fees for technical services chargeable to tax @ 15% on gross basis. While working of tax on total income the assessee determined gross tax including surcharge and education cess

at Rs.72,78,348/- and thereafter claim has been made u/s 90 of the Act amounting to Rs.55,39,431/- as tax credit paid in resident country i.e Germany. The assessee claimed that the income received as supervision charges was its income and in the absence of permanent establishment (PE) in India the same was exempted under Article 7 of India-Germany DTAA. The assessee also stated that Indian income claimed as exempted u/s 90 of the Indian Income Tax has been duly disclosed in the income of Germany entity for the year under consideration. However, the A.O held that M/s Gebr Pfeiffer India Pvt. Ltd. was a permanent establishment of the assessee i.e Gebr Pfeiffer Se through which the assessee has business connection in India. The A.O further stated that Gebr Pfeiffer Se Germany was the holding company of the Indian entity Gebr Pfeiffer India Pvt Ltd. The A.O was of the view that the Indian subsidiary was the face of the assessee company in India and also helped in its business development. The services provided by the assessee which have been termed by it as a part and parcel of business supply was also attributable to the business relation with its Indian subsidiary. Accordingly, the A.O held that the assessee company has a PE in India through its subsidiary namely Gebr Pfeiffer India Pvt. Ltd. Therefore the A.O stated that assessee misreported the taxability of income liable to tax in India amounting to Rs.1,31,81,590/- and he treated the same as under reporting of income of Rs,1,31,81,590/-. Accordingly, the A.O has passed the draft assessment order u/s 143(3) r.w.s.144C of the Act on 17.12.2019.

3. Against the draft assessment order the assessee has raised the objection before the Dispute Resolution Panel. The ground of object raised by the assessee are as under:

- “3. *The addition proposed by the Learned Assessing Officer (The Asstt. Commissioner of Income Tax, International Taxation Circle 2(3)(2), Mumbai) vide his draft Assessment order dated 11.12.2019, is being objected to by the assessee under the Provisions of Section 144C (2) (b) on the following objections which may be read separately:*
1. *That the Learned Assessing Officer has grossly erred both on facts and law in passing the impugned order,*
  2. *That the Learned Assessing Officer has grossly erred in the interpretation of Article 5 and Article 7 of the DTAA between India and Germany,*
  3. *That the Learned Assessing Officer has grossly erred both on facts and law in considering M/s GEBR Pfeiffer India Private Limited as Permanent Establishment (PE) of the Assessee ie, GEBR.Pfeiffer SE;*
  4. *That the Learned Assessing Officer has grossly erred both on facts and law in considering M/s GEBRPfeiffer India Private Limited as Permanent Establishment (PE) of the Assessee, as the assessee is a holding company of M/s GEBR Pfeiffer India Private Limited.*
  5. *That the Learned Assessing Officer has grossly erred both on facts and law in considering that the assessee has business connection in India through its AE namely M/s GEBRPfeiffer India Pvt Ltd.*
  6. *That the Learned Assessing Officer has grossly erred both on facts and law in not appreciating the fact that the Indian Subsidiary of the Assessee is not a Dependent Agent/Dependent Permanent Establishment of the Assessee and could not be treated as a Permanent Establishment (PE) of the Assessee.*
  7. *That the Learned Assessing Officer has grossly erred both on facts and law in attributing profits to GEBRPfeiffer SE assuming that GEBRPfeiffer SE has PE in India through its Indian Subsidiary GEBR Pfeiffer India Pvt Ltd which is an independent entity and has no contribution or attribution to the profits of GEBR Pfeiffer SE in India or elsewhere:*
  8. *That the Learned Assessing officer has grossly erred in considering Indian subsidiary as the face of the Assesse which is devoid of facts and such a concept is alien to the Indian Income Tax Act 1961.*
  9. *That the Assessing Officer has grossly erred in considering that the Indian subsidiary helps in business development, to the Assesse Company without any contrary evidence or at any show cause before coming to such a conclusion.*

10. *That the Assessing Officer has grossly erred both on facts and law in the interpretation of various judicial decisions of the courts and Me reports of OECD in the draft order assessment order passed and in applying the same to the facts and circumstances of the case of the assessee company.*
11. *That the Assessing Officer has grossly erred in applying Rule 10 of the Income Tax Rules to the facts and circumstances of the case of the assessee company which is devoid of facts applicable to the assessee.*
12. *That the Learned Assessing Officer has grossly erred in estimating that 100% of the gross revenue earned by the Assessee was attributable to the PE which otherwise is also without any basis and has been estimated without any contrary evidence or Issuance of any show cause before coming to such a conclusion;*
13. *That the Assessing Officer has grossly erred in rejecting the claim of tax credit without appreciating the true facts and circumstances of the assessee company.*
14. *That the Learned Assessing Officer has grossly erred both on facts and law in considering that transfer pricing provisions of the Income Tax Act, 1961 are applicable to the company ignoring the submissions made by the assessee as well as misinterpreting the facts and applicable provisions of the Income Tax Act, 1961;*
15. *That the learned Assessing Officer has grossly erred in levying of interest under section 234A, 234B, 234C & 234D which in any case could not be charged.*
16. *That the learned Assessing Officer has grossly erred in initiating penalty proceedings under section 270A read with Section 274 of the Income Tax Act.*
17. *That the learned Assessing Officer has grossly erred in initiating penalty proceedings under section 271BA read with Section 274 of the Income Tax Act.”*

The assessee has submitted before the DRP that there was no permanent establishment (PE) of the company in India as per Article 5 of the India Germany DTAA. It was also explained that assessee's subsidiary in India Gebr Pfeiffer India Pvt. Ltd. was engaged in the business of non-core items whereas the assessee was engaged in business of production of core components and the assessee company had entered into a composite contract with different companies in India for sale

of capital goods manufactured by it. (core components and related supervision services) and also for services relating to supervision, installation and commissioning of imported components of cement grinding mill to parties in India namely, Shree Cement Ltd., JayPee Cement Corporation Ltd, Emami Cement Ltd. from whom the assessee has received the amount of Rs.1,31,81,590/- for the aforesaid services. However, the ld. DRP has not agreed with the submission of the assessee and held that the assessee maintained a fixed place of business at the premises of its subsidiary Gebr Pfeiffer India Ltd. from where significant core activities of the assessee were being carried out.

4. During the course of appellate proceedings before us the ld. Counsel contended that assessee company was engaged in business of manufacturing and supply of core components relating to cement plant whereas its subsidiary company based in India was engaged in the business of non-core items which were also required for cement plants. The ld. Counsel submitted that because of different function performed by these company the A.O has failed to establish that how the assessee was having permanent establishment in the form of its subsidiary company in India when both these companies have performed separate function directly to their client. The ld. Counsel has also referred different pages of paper book in respect of various submission made before the A.O and DRP during the course of assessment proceedings and DRP proceedings. The ld. Counsel referred letter dated 27.11.2019 filed before the A.O wherein with various details it was explained that assessee has no activity based permanent establishment in India. The ld. Counsel also submitted that

assesse company has executed separate contracts with its clients in India. He referred copy of supervision contracts placed in the paper book which were executed separately by the assessee company with Shree Cement, Jaypee Cement Ltd., Emami Cement and also submitted that assessee's subsidiary company has also executed such contracts for supplying of non-core items directly with some of such clients. The ld. Counsel submitted that all the supporting and relevant document furnished by the assessee were not taken into consideration by the DRP while adjudicating the objection filed by the assessee against the draft assessment order made by the A.O. The ld. Counsel has also placed reliance on the various judicial pronouncements as under:

- “1. *Judgment of Hon'ble Supreme Court of India in the case of DIT vs Samsung Heavy Industries Co. Ltd. reported in 426 ITR 1.*
2. *Judgment of Hon'ble Supreme Court of India in the case of ADIT vs E-Funds IT Solution Inc reported in 399 ITR 34.*
3. *Order of Hon'ble ITAT Delhi in the case of AB Sciex Pte Ltd. vs ACIT in ITA No. 514/Del/2021.*
4. *Order of Hon'ble ITAT Delhi in the case of Swiss Re-Insurance Company Limited vs DDIT in ITA No. 1667/Mum/2014.*
5. *Order of Hon'ble ITAT Delhi in the case of DCIT vs Marubheni Corporation, Japan in ITA No. 10/Mum/2022.*
6. *Judgment of Hon'ble High Court of Delhi in the case of National Petroleum Construction Company vs DIT reported in 383 ITR 648.”*

On the other hand, the ld. D.R submitted that assessee has maintained a fixed place of business through its subsidiary concern, i.e Gebr Pfeiffer India from where significant core activities of the assessee company were carried out. The ld. D.R also relied on the finding of DRP holding that the assessee has fixed place as a PE in India.

5. Heard both the sides and perused the material on record. The assessee is a resident of Germany and engaged in the

business of design, engineering and supply of machinery, spare, supervision, erection and commissioning grinding plant for cement manufacturing company. Without reiterating the facts as elaborated supra in this order, the assessee has declared income from supervision services of Rs.1,31,81,590/-for inspection/optimization/erection/commissioning repair in India to other parties. The assessee claimed that such income was not subjected to tax by virtue of provision of Article 7 r.w.Article 5 of the DTAA between India & Germany. However, the DRP was of the view that the assessee and its subsidiary Gebr Pfeiffer India P. Ltd. were operating in the same segment of industry and stated that it was possible for both the assessee and its associate enterprise to work with same clients. The DRP further stated that both these companies were working in the same industry and their supply line compliment each other perfectly. Therefore, the ld. DRP held that the core activities of the assessee have been performed throughout the year through a fixed place of business through its subsidiary company in India, therefor it has a PE in India in terms of Article 5(1) of the DTAA between India & Germany. However, we find that before the A.O & DRP the assessee has specifically furnished the copy of contract executed between the assessee and their client and between its subsidiary company and their client separately for the different nature of work. The detail of such document furnished before the lower authorities were as under:

- “1. *Copy of Supervision Contract between Shree Cement Ltd and Gebr.Pfeiffer SE dated 11th March, 2013 with amendments dated 21/03/2013 & 18/10/2014.*
2. *Copy Supervision Contract between Shree Cement Ltd and Gebr.Pfeiffer India Pvt Ltd dated 09/08/2016 with amendments dated 16/02/2018*

3. *Copy of Contract between Shree Cement Ltd and Gebr.Pfeiffer India Pvt Ltd dated 12/04/2016 for supply of raw mill and coal mill (Indigenous)*
4. *List of non-core Item supplied by Gebr.Pfeiffer India Pvt Ltd to Shree Cement Ltd.*
5. *Supervision Contract between Emami Cement Ltd (Panagarh Project) and Gebr.Pfeiffer SE dated 09/06/2016.*
6. *Supervision Contract between Emami Cement Ltd (RISDA Project) and Gebr.Pfeiffer SE dated 23/09/2014 with amendments dated 05/12/2015*
7. *Supervision Contract between Emami Cement Ltd (Panagarh Project) and Gebr.Pfeiffer India Pvt Ltd dated 08/03/2016.*
8. *Supervision Contract between Emami Cement Ltd (RISDA Project) and Gebr.Pfeiffer India Pvt Ltd dated 22/09/2014 with amendments dated 30/12/2014 & 18/11/2015.*
9. *Supervision Contract between Jaypee Cement Corporation Limited and GEBR PFEIFFER SE dated 3rd May 2016.*
10. *Details of engineers visited India to carry out contractual obligation with copies of the minutes of meetings.”*

However, neither the A.O nor the DRP has specifically disputed these contracts in their finding. We have perused the copy of these contracts placed in the paper book i.e supervision contract between Shree Cement Ltd. & assessee dated 11.03.2013 wherein detail of scope of service, price terms of payment and nature of work were mentioned with other particular. Similarly, we have also perused the separate supervision contract executed by the assessee company with Emami Cement Ltd. on 09.06.2016 and also separate supervision contracts with Jaypee Cement Corporation on 03.05.2016 wherein the terms and conditions and scope of the work etc, were mentioned. The assessee has also furnished the detail of engineers visited India to carry out contractual objection with copies of the minutes of the meeting etc. However, we find that DRP/AO has not controverted the genuineness of the different contracts executed by the assessee company with the different clients to whom it had rendered services pertaining to core components for manufacturing of

cement. It is also noticed that the DRP/AO has not brought on record any other material to demonstrate that assessee has not acted directly for providing services to the clients in India and it has also not been established that how the assessee used the premises and services of its associate enterprise (subsidiary company namely (GIPL) in India. Therefore, looking to the above facts and the judicial pronouncements referred by the Id. Counsel we consider that AO/DRP is not justified in holding that assessee has used the premises of its associate company in India for rendering services to its clients. Therefore, the ground of appeal of the assessee are allowed.

**ITA No. 54/Mum/2022**

6. Since, we have allowed the appeal of the assessee vide ITA No. 1507/Mum/2021, therefore, this appeal of the assessee has become academic which is not required any adjudication the same stand dismissed.

7. In the result, the appeal of the assessee are partly allowed.

Order pronounced in the open court on 20.04.2023

Sd/-  
(Aby T. Varkey)  
Judicial Member

Sd/-  
(Amarjit Singh)  
Accountant Member

Place: Mumbai

Date 20.04.2023

Rohit: PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,  
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//  
आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण/ ITAT, Bench,**  
**Mumbai.**