IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE 'C' BENCHES :: PUNE

BEFORE SHRI R.S. SYAL, HON. VICE-PRESIDENT &
SHRI PARTHA SARATHI CHAUDHURY, HON. JUDICIAL MEMBER

ITA No.174/PUN/2023
(A.Y. 2020-21)

TDK Electronics AG (Formerly known as EPCOS AG), C/o EPCOS India Pvt. Ltd., E 22-25, MIDC Satpur, Nashik. PAN: AAACE 9787 H	vs	ACIT (International Taxation), Circle-2, Pune.
Appellant/Assessee		Respondent /Revenue

Assessee by	:	Shri Siddhesh Chaugule, AR
Revenue by	:	Shri M.M. Chate, CIT-DR
Date of hearing	:	22/05/2023
Date of pronouncement	:	23/05/2023

O R D E R

Per PARTHA SARATHI CHAUDHURY, JM:

This appeal preferred by the Assessee emanates from the findings of ld. DRP-3, Mumbai-2, dated 20.12.2022 for A.Y. 2020-21 as per the following grounds of appeal:

"*Ground No.1 - Erroneous levy of income tax and interest thereon*

1.1. The Assistant Commissioner of Income-tax (International Taxation) - Circle 2, Pune ('the Learned. AO') has erred in law and on facts in:

a. Holding that the Appellant has a Permanent Establishment (PE) in India and its income from Royalty and Fees for Technical Services (FTS) is taxable under section 115A r.w.s. 44DA of the Income Tax Act, 196 I ('the Act');

b. Levying income tax including interest under section 234A and section 234B of the Act and raising a net demand payable of Rs.7,22,18,080 upon the Appellant.

Ground No.2 - Non-constitution of Permanent Establishment ('PE') of the Appellant in India

2.1 On the facts and in the circumstances of the case, the Learned AO erred in concluding that the Appellant's Indian subsidiary constitutes its 'Business Connection' in India under Section 9(1)(i) of the Act or a 'Permanent Establishment' ('PE') in India under Article 5(1), 5(2), 5(5) and 5(6) of the Tax Treaty.

2.2 The Learned AO failed to appreciate that the Appellant operates entirely from outside India, has no fixed place of business in India as envisaged under Section 9(1)(i) of the Act or Article 5(1) or 5(2) of the Tax Treaty, directly or in the form of its Indian Subsidiary. Further Article 5(5) and 5(6) of the Tax Treaty do not apply to its case as they relate only to local Indian agents engaged in buying and selling goods in India on behalf of their Overseas Principal which is not the fact in the case of the Appellant and the Appellant claims relief accordingly.

2.3 It is prayed that the Learned AO be directed to tax its India source income from its Indian Subsidiary in the form of Royalty and Fees for Technical Services at 10% on gross basis under Article 12 of the Tax Treaty as offered by it in the Return of Income.

Ground No.3 - No attribution of income deemed to accrue / arise in India possible, to the alleged PE of the Appellant in India

3.1 Without prejudice to the above and on the facts and in the circumstances of the case and law, the Learned AO erred in concluding that the Appellant's India source income taxable on deemed accrual basis is attributable to the alleged PE in India under Article 7 of the India-Germany Tax Treaty ('Tax Treaty').

3.2 The Learned AO failed to appreciate that since the Appellant operates entirely from outside India (Germany) and carries out no operations in India, no income can be attributed to the alleged PE in India under Article 7 of the Tax Treaty, and even otherwise pursuant to Article 7(3) of the Tax Treaty. the taxation on gross basis at higher rates under Section 115A / 44DA of the Act is unwarranted and the taxation ought to be at 10% on gross basis under Article 12 of the Tax Treaty as offered in the Return of Income and the AO be directed accordingly.

4. Ground No.4 - Denial of recourse to Non-discrimination clause - Article 24 of the Tax Treaty denied

4.1 Without prejudice to the above and on the facts and the circumstances of the case, the Learned AO has erred in not granting the benefit of Article 24 of the Tax Treaty relating to Non-Discrimination to the facts of the Appellant's case.

4.2 The Learned AO failed to appreciate that under Article 24 - Non-Discrimination of the Tax Treaty, the Appellant and its alleged PE in India cannot be subjected to taxation requirement which is more burdensome than the taxation of Resident in India for its alleged PE

and therefore the Learned AO be directed to tax the income on net basis based on audited financial statements as against gross basis under Section 115A / 44DA of the Act.

Ground No.5 - Consequential Levy of Interest under section 234A and 234B of the Act

5.1 On the facts and in the circumstances of the case and in law, the Learned AO erred in levying consequential interest of Rs. 15,81,417 and Rs.1,79,22,726 under section 234A and 2348 of the Act respectively.

5.2 It is prayed that the Learned AO be directed to delete the amount of consequential interest levied under section 234A and 234B of the Act.

The Appellant prays that directions be given to grant all such relief arising from the above grounds and also all relief consequential thereto.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

2. At the outset, ld. counsel for the assessee has submitted that the only issue for consideration in the present appeal is that whether the Indian subsidiary in India constitutes a PE since the Assessing Officer (AO) has attributed the taxability of the international transactions for the assessee only on this ground.

3. The relevant facts are TDK Electronics AG (formerly known as EPCOS AG) is a non-resident company having its head office at Munich, Germany. The assessee has only one associated enterprise in India namely, TDK India Pvt. Ltd. ('AE' or 'TDK India'). The assessee is engaged in the manufacture and sale of passive electronic components used in the electronics and the communication equipment industry. TDK AG was formed from a joint venture between Siemens

and Matsushita in 1989. The joint venture consisted of a limited partnership and its general partners. In October 1999, Siemens and Matsushita converted the limited partnership into a stock corporation and Siemens contributed to the Company essentially all of its electronic components operations that had not been the part of the joint venture. Until March 2006, Siemens and Matsushita together owned 25% of the share capital of TDK. AG, Siemens sold its entire shareholding of 12.5% in TDK AG on 29th March 2006 and Matsushita should its entire shareholding of 12.5% in TDK AG on 23 October 2006. TDK Corporation, Japan then agreed to acquire a controlling stake in TDK AG on 31 July 2008. TDK AG mainly provides business support services in the nature of Information Technology Support services, corporation and Export Support Services related to export of goods project statement to Frame Service Agreement for advertisement campaign as well as it provides the technical know-how to TDK India Pvt. Ltd. which is subject to tax in India.

3.1 During the year under consideration, the assessee has received as income of Rs.69,77,72,532/- which has been classified under different heads. It can be seen that the assessee has not considered the taxability of these payments under the Act and has straightway decided to be governed under the provisions of the treaty wherein it has charged the tax at the rate of 10% as applicable to Interest /Royalty/FTS under India Germany Double Taxation Avoidance

Agreement (DTAA). The ld.AO observed it can, therefore, be safely presumed that the assessee itself thinks that its payments are taxable under the Act and hence it has sought the relief under the treaty. The only contention of the assessee is that its income should be taxed under the heads of Royalty, FTS and interest as per the provisions of the DTAA between India and Germany and not as per the provisions of the Income-tax Ac, 1961. It has been maintained by the assessee that its income is not taxable as business profits in India in view of the absence of Permanent Establishment (PE) in India, as per the provisions of the DTAA between India and Germany.

3.2 At para 10.4 of the draft assessment order, the AO finally holds that during the year under consideration, the assessee was in receipt of income in the form of Royalty or Fees for Technical Services amounting to Rs. 44,52,19,090/- which is attributable to PE in India. Accordingly, the same income is taxed u/s. 115A r.w.s. 44DA of the Act (in case of Royalty/FTS) at 40% without allowing any deduction in respect of any expenditure or allowance under any of the sections from ss. 28 to 44C. This has to be read with the submissions of the assessee annexed in the appeal memo at page 21 where clear-cut tabulation has been provided as follows totaling to Rs. 44,52,19,090/-

Sr.No.	Description of International transaction	Amount (Amount in INR)
1	Rendering business support and IT Support services to EIPL	39,86,35,326
2	Receipt of royalty from TDK India Pvt. Ltd.	2,59,26,836

3.	Income from management/ technical services	2,06,56,928
	Total	44,52,19,090

3.3 Further, even in the return of income filed by the assessee, which is annexed at factual paper book at page 3, the total income reflects at Rs.44,52,19,090/-. The ld. DRP only, on the other hand, relied on their earlier direction in the case of the assessee for A.Ys. 2017-18, 2016-17 & 2014-15 on this issue and had found that the facts for the current year and the issues are *pari materia* with these years as referred to. In the findings of the ld. DRP for those years, they had referred to their own findings for A.Y. 2013-14. Based on the reliance placed on their own findings of the ld. DRP for the earlier years, which is reproduced in detail in the findings of ld. DRP and is not repeated herein for the sake of brevity, based on these discussions, ld.DRP rejected the objections raised by the assessee and upheld the draft order of the AO in this regard.

4. We have perused the case records, heard the submissions of the parties herein and have given considerable thought to the submissions placed before us along with the judicial pronouncements.

4.1 We observe that the findings of the ld. DRP in upholding the draft assessment order are that subsidiary in India constitutes PE and, therefore, necessary arising of taxability on the issue is based on the ld. DRP's earlier findings for A.Ys. 2016-17 & 2017-18. Now, these

years on an appeal before the Pune Tribunal in assessee's own case for A.Ys. 2016-17 & 2017-18 in ITA Nos. 160/PUN/2021 & 172/PUN/2022 order dated 28/04/2022 had an opportunity to address the said issue on an identical facts and circumstances whether such subsidiary in India constitutes PE or not. The relevant observations are as follows:-

> *"2. Tersely stated, the facts of the case are that the assessee is a tax resident of Germany. Return of income was filed declaring total income at Rs.30,52,26,440/-, which was offered for taxation at 10% under the Double Taxation Avoidance Agreement between India and Germany (DTAA). The income consisted of Income from Support services in relation to Information Technology, Marketing and Sales amounting to Rs.22.88 crore; Royalty of Rs. 1.40 crore; and Interest of Rs.6.23 crore received on ECB loans from its Indian subsidiary. The Assessing Officer (AO) held in draft order that the assessee was having a Permanent establishment (PE) in India in the form of its Indian subsidiary, namely, M/s EPCOS India Private Ltd. (EIPL). This view was canvassed on the basis of similar decision taken by him in earlier years. In the final analysis, he held that because of the assessee's PE in India, the first two items of income, namely, Support services offered by the assessee as Fees IT for technical services and Royalty were liable to tax at 10% on gross basis. The Dispute Resolution Panel (DRP) approved the action of AO in treating the assessee's Indian subsidiary as its PE. There is no dispute on the Interest earned on ECB loans amounting to Rs.6.23 crores, for which necessary relief was granted by the DRP. The assessee is aggrieved by treating EIPL as its permanent establishment in India. 3. We have heard the rival contentions and gone through the relevant material on record. The DRP has discussed this issue at page 28 of its directions by observing that the facts for the instant year are in pari materia with those for the earlier years starting from A.Y. 2006-07 to A.Y. 2014-15, for which the Tribunal has decided this issue in favour of assessee. It however, upheld the decision of the AO in the draft order on the raison d'etre that the Revenue would be otherwise left without any remedy as no appeal by the Revenue lies before the Tribunal against the incorporation in the final assessment order of the directions given by the DRP. It is seen that the Tribunal, right from the A.Y. 2003-04 up to the A.Y. 2014- 15, has decided the issue in favour of the assessee by holding EIPL does not constitute PE of the assessee in India. The ld. DR candidly admitted that there is no change in the facts and circumstances of the instant year vis-à-vis the earlier years. Respectfully following the precedent, we hold that the EIPL does not constitute the assessee's PE in India. This issue is therefore, decided in favour of assessee."*

Ld.DR could not bring out any distinguishable decision of higher

forum favouring the Revenue. Therefore, on the same facts and circumstances and upon the same parity of reasoning, this issue is decided in favour of the assessee.

5. In the result, appeal of the assessee stands allowed.

Order pronounced in open Court on 23rd May, 2023.

Sd/-	Sd/-
(R.S. SYAL)	(PARTHA SARATHI CHAUDHURY)
VICE-PRESIDENT	JUDICIAL MEMBER

Dated : 23rd May, 2023

vr/-

Copy to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
5. The DR, ITAT, "C" Bench Pune.
6. Guard File.

By Order

// TRUE COPY //

Senior Private Secretary
ITAT, Pune.